Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-372

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BERNARD KLEIMAN
JAMES D. ENGLISH
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

® · 60

QUESTIONS PRESENTED *

1. Whether the rights vested in "members" by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") extend to persons who at one time were, but no longer are, employed in a workplace represented by a union, and who therefore do not meet the union's standards for retention of membership, but who have not been formally "expelled" by the union from membership.

2. If so, whether § 501(b) of the LMRDA, 29 U.S.C. § 501(b), to that extent violates Article III of the Constitution of the United States by conferring authority to sue derivatively, on behalf of a union, upon persons who do not have a personal stake in the outcome of the litigation.

3. Whether, consistent with § 501(b) of the LMRDA, which authorizes a court to "allot a reasonable *part of the recovery* . . . to pay the fees of counsel," a court may enter a fee award against a non-party union that is three times the amount that has been recovered for the union's benefit. More specifically:

(a) Whether, under the doctrine of *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), the express fee provision in § 501(b) precludes judicially-created "common benefit" fee awards that exceed the amount of the recovery;

(b) If common benefit fee awards in § 501(b) cases are not wholly foreclosed, whether in a case where the sole

---

* There are no parties to this action except those listed in the caption. Messrs. Bryan, Comer, Bullard and Greene, who are listed as respondents on this petition, have filed their own petition for writ of certiorari seeking review of the decision below, which is pending as No. 85-2077. U.S. Fidelity & Guaranty Corp., although a party below and listed as a respondent herein, has no stake in the resolution of the instant petition, in light of its exoneration by the court below (App. 20a-21a)—an exoneration that is not challenged in this Court.

relief obtained on the merits is a monetary recovery, a common-benefit fee exceeding the amount of that recovery may be awarded on the sole premise that the outcome of the lawsuit will create a precedent that should serve as an incentive for a party to change its ways in the future in order to avoid similar lawsuits—a proposition that would render the "common benefit" doctrine indistinguishable from the "private attorney general" doctrine.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. THE "MEMBER" ISSUE	9
A. The Meaning of the Term "Member" in the LMRDA	10
B. The Constitutional Question	14
II. THE ATTORNEYS FEE ISSUE	15
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Allen v. Wright, 468 U.S. 737 (1984)	14
Alvey v. General Electric Co., 622 F.2d 1279 (7th Cir. 1980)	6, 9
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)	19, 23
Bakery & Confectionery Workers Int'l v. Ratner, 335 F.2d 691 (D.C. Cir. 1964)	17
Brennan v. Independent Lift Truck Builders Union, 490 F.2d 213 (7th Cir. 1974)	9
Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)	8, 15, 18-20, 23
Hall v. Cole, 412 U.S. 1 (1973)	19
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)	15
Head v. Brotherhood of Railway, Airline & Steamship Clerks, 512 F.2d 398 (2d Cir. 1975)	17
Highway Truck Drivers & Helpers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963)	17
Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972)	17
Linda R.S. v. Richard D., 410 U.S. 614 (1973)	15
Local No. 92, Int'l Assn. of Ironworkers v. Norris, 383 F.2d 735 (5th Cir. 1967)	17
Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984)	17
Piper v. Chris-Craft Industries, 430 U.S. 1 (1977)	10
Sabolsky v. Budzanoski, 457 F.2d 1245 (3rd Cir.), *cert. denied*, 409 U.S. 853 (1972)	17
Shimman v. Local 18, International Union of Operating Engineers, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985)	9, 15, 21
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	14
Steelworkers v. Sadlowski, 457 U.S. 102 (1982)	13
Taylor v. Great Lakes Seamen's Union, Local 5000, 701 F.2d 590 (6th Cir. 1983)	9-13
Usery v. Local 639 Teamsters, 543 F.2d 369 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977)	17

TABLE OF AUTHORITIES—Continued

Page

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 14
Warth v. Seldin, 422 U.S. 490 (1975) 14, 15

Constitution and Statutes

Constitution, Article III 10, 14-15
28 U.S.C. § 1254(1) 2
Labor-Management Relations Act of 1947, Sec. 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) 13
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 et seq.:
Section 3(o), 29 U.S.C. § 402(o) 2, 5-6, 10-14
Section 101(a)(5), 29 U.S.C. § 411(a)(5) 13-14
Section 501(b), 29 U.S.C. § 501(b) ..... *passim*
Section 501(c), 29 U.S.C. § 501(c) 4

Legislative Materials

104 Cong. Rec. (1958) 16
105 Cong. Rec. (1959) 13, 16
H. Rep. No. 741, 86th Cong., 1st Sess. 45 (1959) 16
NLRB, *Legislative History of the LMRDA* (1959) 16

Miscellaneous

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819 (1960) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Elbert Erkins, et al. v. Billy Bryan, et al.*, 785 F.2d 1538 (11th Cir. 1986).

OPINIONS BELOW

The initial opinion of the United States District Court for the Middle District of Alabama (hereinafter "the District Court") is reported at 494 F. Supp. 732, and is reprinted in the separately-bound Appendix to this Petition ("App.") at 53a-61a. The District Court's opinion denying reconsideration is reported at 494 F. Supp. 737, and is reprinted at App. 62a-65a. The opinion of the

United States Court of Appeals for the Eleventh Circuit reversing and remanding for further proceedings is reported at 663 F.2d 1048, and is reprinted at App. 40a-51a. The order of the Eleventh Circuit denying rehearing, and amending the opinion, is reprinted at App. 52a. A petition for writ of certiorari to review that decision was denied, 459 U.S. 989. The opinion of the District Court on remand is reported at 598 F. Supp. 240, and is reprinted at App. 23a-39a. The opinion of the Eleventh Circuit affirming is reported at 785 F.2d 1538, and is reprinted at App. 1a-21a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 8, 1986 (App. 22a). On July 1, 1986, Justice Powell signed an order extending the time to file a petition for writ of certiorari to and including July 28, 1986. On July 17, 1986, Justice Powell signed an order further extending the time to file a petition for writ of certiorari to and including September 5, 1986. (These orders bore the number A-1017.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of Sections 3(o) and 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 402(o), 501(b), are reprinted in the Appendix at 66a-67a.

STATEMENT OF THE CASE

Petitioner (hereinafter "USWA") was the exclusive bargaining representative of the 300 production and maintenance employees at the Eufala, Alabama, plant of American Buildings Company. To assist in performing its representational functions, USWA chartered a local union—Local 7326 ("the Local"). The Local's member-

ship consisted exclusively of the employees at that one plant.

In December, 1976, the employees at the plant struck for a new contract. The strike was not successful, and after eighteen months, a combination of strike replacements and returning strikers voted in an NLRB election to decertify USWA as bargaining representative.

USWA's Constitution extends membership only to those "employed in . . . a[] . . . place within the jurisdiction of the International Union." With the decertification, the employees of the Eufala plant ceased being eligible for membership in USWA. Perforce, they no longer were obligated to pay dues to USWA, and in fact stopped paying dues. The Local became dormant.

In December, 1979--seventeen months after USWA's decertification—USWA received a letter from Thomas Jacobson, who stated that he was an attorney representing some of the former employees at the Eufala plant. The letter alleged that during the strike four other former employees at the plant, who had been officers of the Local, had misappropriated monies from USWA's Strike and Defense Fund.[1] In a follow-up letter the next month, Jacobson demanded that USWA file suit against the alleged wrongdoers seeking recovery of the misappropriated funds, asserting that his clients would do so if USWA did not.

---

[1] During the course of the strike, USWA, in accordance with its standard procedures, sent monies from its International Strike and Defense Fund to the Local. These monies were placed in a special local strike fund account by the Local and were to be used to aid strikers in need of financial assistance and to pay costs incurred by the Local (or its officers or members) in the conduct of the strike, such as the cost of publicizing the strike or of mounting a boycott of the Company's products. Any assets remaining in the Local's strike fund account at the conclusion of the strike were to be returned to USWA's Strike and Defense Fund. Accordingly, the victim of any misappropriations would be USWA, not the Local.

USWA determined that the most cost-effective way to detect any misappropriation and secure recovery was to turn the matter over to the United States Department of Labor ("DOL") for investigation, pledging USWA's full cooperation to DOL.[2] If DOL found wrongdoing, USWA would be able to recover all losses under its "Labor Organization Bond" without having to incur the expense of litigation—a procedure USWA had successfully followed in two prior instances.

On May 1, 1980, while the DOL investigation was in progress,[3] Jacobson's clients (respondents Erkins and Denson) commenced this action against the alleged wrongdoers (respondents Bryan, Comer, Greene and Bullard) seeking to recover for USWA the money allegedly misappropriated. The action was brought pursuant to § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 501(b), which, under specified circumstances, authorizes a union "member" to sue derivatively on behalf of his union to recover union assets that have been misappropriated.

USWA, although not a party to the lawsuit, intervened for the limited purpose of challenging the plaintiffs' standing to institute the suit. USWA contended that the plaintiffs had ceased being "members" of USWA nearly two years before, when USWA was decertified, and thus could not institute a derivative action which § 501(b) made available only to union members. Plaintiffs, although conceding that they were no longer members of USWA at the time suit was filed, contended that

---

[2] The LMRDA, in addition to authorizing civil actions for the recovery of misappropriated funds, 29 U.S.C. § 501(b), makes such misappropriations a criminal offense, 29 U.S.C. § 501(c). Thus, DOL has authority to investigate allegations of misappropriation.

[3] The DOL investigation concluded in November, 1981, with the indictment of the alleged wrongdoers. On February 26, 1982, they were acquitted of all charges following a five-day jury trial.

it was sufficient that they had been members at the time the alleged misappropriations had occurred.

The district court agreed with USWA that plaintiffs could not maintain this action. It found that plaintiffs had ceased to be members of USWA following USWA's decertification, and it held that suits may be maintained under § 501(b) only by persons who are members at the time of filing suit (App. 56a-61a). The court reasoned (App. 59a):

> The plaintiffs in the instant suit . . . may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. 7A C. Wright & A. Miller, *Federal Practice and Procedure*, 325 (1972); 19 Am. Jur. 2d, *Corporations*, § 559. A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise.

The district court accordingly withdrew leave to file the complaint—leave that is required as a prerequisite to maintaining a suit under § 501(b) (App. 61a).

Plaintiffs appealed, and the United States Court of Appeals for the Eleventh Circuit reversed and reinstated the complaint. The court reasoned that regardless whether plaintiffs were still members within the meaning of USWA's Constitution, they were still "members" within the contemplation of the LMRDA. The court reached that conclusion by construing the definition of "member" in § 3(o) of the LMRDA, 29 U.S.C. § 402(o), to mean

that an individual who once qualifies for union membership becomes a member for life, unless, thereafter, "one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after 'appropriate proceedings' held pursuant to lawful constitutional or bylaw provisions" (App. 46a-47a, quoting and following *Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980)). As neither event had occurred here, plaintiffs were still "members" for LMRDA purposes, and could maintain this action even though they had no stake in its outcome:

> It is . . . not necessary that the petitioners in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members [under § 3(o)], the law says they have standing to conduct litigation. [App. 45a].[4]

The suit was thus remanded to the district court for trial of plaintiffs' charges that the defendants had misappropriated strike funds. USWA—whose limited intervention was exhausted with the resolution of the "member" issue—was not a party to the litigation on the merits, and did not participate at the trial. After a three-day trial, the district court determined that the defendants had misappropriated $14,461.30, and ordered that they pay that amount to USWA. That was the sole relief awarded in the suit.

Plaintiffs thereupon filed an application for an award of $305,000 in attorneys' fees, *and asked that the fees be awarded against USWA.* USWA intervened once again, this time to resist the fee award.[5] USWA acknowledged that, as § 501(b) expressly provides, the court could "allot a reasonable part of the recovery . . .

---

[4] USWA sought certiorari from this interlocutory ruling, which was denied, 459 U.S. 989 (1982).

[5] USWA also renewed its contention that plaintiffs were not "members" entitled to prosecute this § 501(b) action.

to pay the fees of counsel prosecuting the suit," but, USWA contended, the court had no authority to shift fees except as thus authorized. USWA pointed out that the demand for an award against USWA exceeded the statutory authorization in two respects: (1) it sought an award from USWA irrespective of whether USWA actually recovered from the defendants (who claimed to be judgment-proof), and (2) it sought an amount far exceeding what USWA would recover even if defendants paid in full.

The district court ultimately entered an order requiring USWA to pay $42,000 in fees to plaintiffs' attorneys —three times the amount of the misappropriations the court had ordered be returned to USWA. The court reasoned that despite the language of § 501(b), fee awards "may exceed the monetary recovery in cases where plaintiffs obtain[] a favorable, non-monetary benefit for the union" (App. 30a). Here, the court found, there were two such benefits: the suit demonstrated that USWA's "elaborate system" for auditing strike funds to prevent misappropriation by local union officials had not worked in this instance (*id.*), and the suit taught USWA that if it did not itself sue alleged wrongdoers it would be obliged to pay the fees of outside counsel who did so on USWA's behalf (App. 31a).[6]

---

[6] The court found the first of these "benefits" notwithstanding the undisputed evidence, introduced by USWA, that its auditing system had been overwhelmingly successful in preventing misappropriations generally; that the only reason the system had not caught the misappropriations here was that the USWA auditor assigned to this local had been terminally ill and thus had been unable to perform the audit; that, in any event, after the misappropriations here but a year before USWA learned of them, USWA coincidentally had altered its monitoring system in a manner that would prevent a recurrence of the wrong that had occurred here; and, finally, that this suit and its outcome would not prompt USWA to change the monitoring system already in place.

The second "benefit"—USWA's learning the value of suing wrongdoers itself—was at least quixotic, given the district court's simul-

USWA appealed the fee award, and the Eleventh Circuit affirmed. The court deemed itself bound by its prior holding that plaintiffs were statutory "members" entitled to maintain this action (App. 4a-5a). And the court ruled that a non-party union can be made to pay fees to the plaintiffs' lawyers in a § 501(b) action even though the fees exceed the amount of the recovery and even though the union has not received the recovery (App. 14a). Declaring that "[t]he better guide to statutory construction here is Congress's ultimate purpose in legislating, not its 'plain language'" (App. 16a), the court rejected USWA's contention that the express fee provision in § 501(b)—authorizing the trial court to "allot a reasonable *part of the recovery* . . . to pay the fees of counsel prosecuting the suit" (emphasis added)—foreclosed a fee award against the union exceeding the amount of the recovery. The court reasoned that the union's reliance on *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), was misplaced. While *Fleischmann* "holds that where Congress has set out a detailed scheme of remedies for a statutory cause of action, courts may not expand those remedies" by making common benefit fee awards, "[t]he remedies provided under § 501 of the LMRDA do not approach the specificity of those considered in *Fleischmann*" (App. 14a). In particular, "[n]otably omitted" from the statute considered in *Fleischmann* was "any reference to attorney fees," whereas § 501 of the LMRDA "provides for an award of attorney fees" (App. 15a).

Fees exceeding the recovery thus could be awarded, under the common benefit rule, if the suit conferred "[s]ubstantial non-monetary benefits" upon USWA (App. 18a). While the existence of such benefits here was not

---

taneous findings that (1) the maximum amount conceivably at issue in the misappropriation claim was $50,000 (App. 36a), and (2) the fees reasonably required to recover the misappropriations were between $95,000 and $100,000 (App. 34a).

"obvious," the district court was "not clearly erroneous" in finding the two that it did (*id.*). The court of appeals recognized that "the Sixth Circuit . . . has refused to shift fees in just this sort of case because the benefit, in its opinion, is no different from results achieved under the private attorney general theory" (App. 19a, referring to *Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226 (6th Cir. 1984)), but "[w]e decline to apply *Shimman* to this case" (App. 19a).

REASONS FOR GRANTING THE WRIT

The Court below has made two central rulings, on each of which there is a conflict among the Circuits, and one of which also conflicts with a decision of this Court. These rulings involve questions that arise with frequency in the lower courts, and the resolution of these questions is thus of great practical importance.

I. THE "MEMBER" ISSUE

Virtually every industrial union limits its membership to those employed in the workplaces that the union represents. Only persons employed in such workplaces are eligible to *join* the union, and eligibility to *remain* a member ceases when either that employment ends or the union's status as bargaining representative ends. The court below, and the Seventh Circuit,[7] have held that even though that may be what the *union* prescribes, a person who once becomes a union member remains a "member" for purposes of exercising the rights accorded to "members" in the LMRDA unless and until either he voluntarily resigns from the union or the union institutes formal proceedings to expel him. That construction of the LMRDA is in square conflict with the Sixth Circuit's decision in *Taylor v. Great Lakes Seamen's Union, Local*

---

[7] *Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980); *Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213 (7th Cir. 1974).

5000, 701 F.2d 590 (6th Cir. 1983), and with the clearly manifested intent of Congress. What is more, its effect, as the court below acknowledged, is to vest the power to bring § 501(b) actions in persons who do not have "any personal stake in the outcome of the litigation," and the construction thus places the LMRDA in conflict with Article III of the Constitution.[8]

The practical implications of the decision below are enormous. Because of the high rate of turnover within workforces, the large number of permanent plant closings, and the less frequent (but not uncommon) decertification of unions, vast numbers of workers move out of the jurisdiction of industrial unions and cease having any continuing stake in those unions' affairs. Yet, unless those unions were to institute prohibitively expensive (and meaningless) proceedings to "expel" such persons from membership, under the decision below those persons will continue to enjoy all the rights of "members" under the LMRDA: *e.g.*, to attend union meetings, to vote in union elections, or, as here, to bring derivative actions on the union's behalf. In a union like USWA, there are literally millions of these phantom "members," and they dwarf in number those who are the true members of the union, *i.e.*, those who continue to work in workplaces represented by USWA.

A. The Meaning of the Term "Member" in the LMRDA

Section 3(o) of the LMRDA, 29 U.S.C. § 402(o), defines "member" as

> any person [1] who has fulfilled the requirements for membership in [a labor] organization, and [2] who neither has voluntarily withdrawn from mem-

---

[8] The union unsuccessfully sought certiorari on this issue at an interlocutory stage in this litigation. That, of course, does not preclude the renewed presentation of the issue upon final resolution of the litigation. *See, e.g., Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977). At the time of the earlier petition, *Taylor* had not yet been decided, and there was not then a conflict in the Circuits.

> bership nor has been expelled or suspended from membership after appropriate proceedings.

The court below based its decision on what it termed "the precise language" of this section (App. 46a). The court read the language to mean that if a person at any time in history "has fulfilled the requirements for membership" that person becomes a member for life, subject only to two conditions subsequent—voluntary withdrawal from membership or expulsion/suspension after appropriate proceedings. That is also the reading of the Seventh Circuit (see p. 9, n.7, *supra*).

But the language of § 3(o) is equally susceptible of a different reading: that *at a given point in time* a person is a union member if (1) he has fulfilled the requirements for union membership (such as working within the the union's jurisdiction or the union's trade) and (2) has not withdrawn or been expelled or suspended from the union. Under this latter reading of § 3(o), the first clause allows a union to define the class of persons who, at any particular point in time, are eligible for membership in the union, and the second clause excludes from membership certain persons who fall within that class but who have elected to withdraw from the union or whose membership has been terminated or suspended by the union (following "appropriate proceedings") for other reasons.

The Sixth Circuit has understood the latter to be the proper reading of § 3(o). In *Taylor*, a case that like this one involved USWA, the Sixth Circuit first quoted the pertinent provision (Article III) of USWA's Constitution:

> All working men and working women . . . *employed* in and around . . . mills, factories and establishments, or in any other place now or hereafter *within the jurisdiction of the International Union* . . . are eligible to membership." [701 F.2d at 591; emphasis inserted by court.]

The Sixth Circuit then described the dispute between the parties:

> The International interprets Article III to mean that employment within the union's jurisdiction is both a prerequisite to *and* a continuing condition of membership.
>
> * * *
>
> The appellants, on the other hand, contend that the language of section 3(o) of the LMRDA prohibits the union from premising "membership" on *continued* employment. . . . According to appellants, this provision guarantees continued union membership to anyone who has *once* fulfilled the threshold requirements and who has neither "voluntarily withdrawn" nor been "expelled after appropriate proceedings." [*Id.* at 591; emphasis in court's opinion.]

The Sixth Circuit resolved this dispute as follows:

> We have reviewed appellants' arguments carefully, but find them unpersuasive . . .
>
> * * *
>
> [W]e find nothing in the LMRDA or its legislative history to indicate that Congress intended the "has fulfilled the requirements of membership" language of section 3(o) to be a guarantee of *continued* membership to ex-employees like the appellants. On the contrary, the floor debates establish conclusively that Congress was determined to preserve the right of a labor organization "to prescribe its own rules with respect to the acquisition and *retention* of membership." 29 U.S.C. § 158(b)(1)(A). [*Id.* at 592; emphasis in court's opinion.]

The words of § 3(o) thus are susceptible to two different readings, and there is a conflict among the Circuits as to which reading is correct.[9] And the Sixth Circuit,

---

[9] The Sixth Circuit in *Taylor* noted that the case before it was distinguishable on its facts from the cases decided by the Seventh Circuit, in that the appellants in *Taylor* had voluntarily relinquished

unlike the court below, found its way to the correct construction by looking to the legislative history, as we show in the margin.[10]

The Sixth Circuit's reading of § 3(o) also comports with the overall objectives of the LMRDA. As that court stated, "we see nothing 'unreasonable' about a rule which, in effect, guarantees that internal union affairs will be governed by those whose interests are most at stake—workers presently employed in the steel industry." *Taylor*, 701 F.2d at 592. The contrary construction of the court below would commit the union's decisionmaking largely to persons who lack a current stake in those decisions—a result at odds with the legislative intent recounted by this Court in *Steelworkers v. Sadlowski*, 457 U.S. 102, 115-19 (1982).[11]

---

their employment, while in the Seventh Circuit cases the loss of employment was involuntary. 701 F.2d at 592. That factual distinction, however, does not diminish the conflict in the Circuits' construction of the language of § 3(o).

[10] As the Sixth Circuit recognized, Congress, twelve years before enacting the LMRDA, had enacted § 8(b)(1)(A) of the Labor-Management Relations Act of 1947, which expressly conferred on unions the right to prescribe their own rules respecting "the acquisition *and retention* of membership therein" (emphasis added). And in the debates over the LMRDA, both of the principal co-sponsors of the LMRDA expressly declared that the LMRDA did not alter that right. Representative Landrum, citing § 8(b)(1)(A), explained that Congress did

> not here seek to repeal that. We do not here withdraw or take away from the unions the right to fix their own rules for the acquisition or *retention* of membership. [105 Cong. Rec. 15722 (1959); emphasis added.]

Representative Griffin confirmed that understanding:

> The labor reform legislation . . . does not touch or deal in any way with the admission to, or *retention of*, membership in a union [*id.* at 15722-23, emphasis added].

No Senator or Representative expressed a contrary intent, or contrary understanding of the import of § 3(o).

[11] The correctness of the Sixth Circuit's construction is confirmed—and the error of the decision below further exposed—by an

B. The Constitutional Question

If the decision below were a correct construction of § 3(o), then the LMRDA would be in irreconcilable conflict with Article III of the Constitution. For as the court below recognized, its construction of "member" vests the power to bring § 501(b) derivative actions in persons who do not have "any personal stake in the outcome of the litigation" (App. 45a). The court found this no problem, reasoning that Congress, by declaring these persons members, "says they have the standing to conduct litigation" (*id.*).

But as this Court has repeatedly held, a personal stake in the outcome is a *constitutional* prerequisite for standing to litigate in the federal courts. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-74 (1982); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984). While Congress can legislate away the *pruden-*

---

examination of § 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5). That section governs the procedures that unions must follow in "expel[ling]" members; it would be directly applicable if the court below were correct in its conclusion that the only way a union can remove from "member" status those no longer within its jurisdiction is to "expel" them. Yet it is apparent from the face of § 101(a)(5) that Congress did not intend to require unions to resort to expulsion when an individual leaves the jurisdiction of the union. Rather, § 101(a)(5) was enacted on the understanding that expulsion was a means used only for disciplining for misdeeds those who would otherwise continue to fit within the union's definition of membership: § 101(a)(5) is entitled "Safeguards against improper disciplinary action"; it applies to proceedings to "fine[], suspend[], expel[], or otherwise discipline[]" union members; and the procedures it requires—for example, notice of "written specific charges" and "a reasonable time to prepare [a] defense"—make sense only in the context of disciplinary proceedings involving those who but for misconduct would meet the union's requirements for continued membership.

tial limitations on standing, it cannot by legislation confer standing where the *constitutional* prerequisites are absent. *Warth v. Seldin, supra*, 422 U.S. at 501.

Nor is this a case in which "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .' " *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982), quoting *Warth v. Seldin, supra*, 422 U.S. at 500, in turn quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3. (1973). The cause of action created by § 501(b), like the derivative shareholder action upon which it is modelled, is to protect the entity's treasury from being wrongfully squandered. All who have a stake in the entity's treasury thus have standing. But it was expressly found in this case that plaintiffs do *not* have a stake in USWA's treasury (App. 59a)—that is, indeed, the reason for the acknowledgment in the opinion below that plaintiffs lack a "personal stake in the outcome of this litigation."

II. THE ATTORNEYS FEE ISSUE

The court below has required USWA—which was not a party to this litigation—to pay a fee to plaintiffs' attorneys that is three times the amount those attorneys have recovered for USWA's benefit. That holding is in open defiance of the language of § 501(b) and the legislative intent, and is inconsistent with this Court's decision in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). The decision, moreover, is in conflict with the Sixth Circuit's decision in *Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1191 (1985), which, as the court below acknowledged, "refused to shift fees in just this sort of case" (App. 19a). And, the decision achieves a result that is precisely the opposite of what Congress sought to accomplish in enacting § 501(b)—a result that squanders, rather than protects, the assets of unions.

A. Section 501(b) contains an express provision respecting awards of fees:

> The trial judge *may allot a reasonable part of the recovery* in any action under this subsection to pay the fees of counsel prosecuting the suit . . . [Emphasis added].

This wording is not inadvertent. Before its adoption, the Senate had defeated a proposed amendment that would have authorized the plaintiff in such a suit "to recover *from the labor organization* his costs and *a reasonable attorney's fee* . . ." 104 Cong. Rec. 11135-49 (1958) (emphasis added). From the time the "reasonable part of the recovery" language was first proposed until the time of its adoption, every explanation of its meaning was consistent with its literal words.[12]

Indeed, so clear was this understanding that it prompted Senator Goldwater to lament that § 501(b)'s fee mechanism "may defeat one of the purposes of the provision, namely, to facilitate member actions to enforce the duties and responsibilities imposed by the bill." 105 Cong. Rec. 16489 (1959). But Senator Goldwater's proposal to "avoid the problem"—substitution of a provision that would authorize the trial court to allow "in addition to any judgment . . . a reasonable attorney's fee" [13]—was not adopted.

---

[12] See, *e.g.*, 104 Cong. Rec. 11327 (Sen. Ervin); *id.* at 11328 (Sen. Javits); 105 Cong. Rec. 6529 (Sen. Javits); *id.* at 15549 (Rep. Elliott); H. Rep. No. 741, 86th Cong., 1st Sess. 45 (1959). See also, Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 828 (1960).

[13] Senator Goldwater advocated "use of the same language as in other comparable provisions" of the House bill, 105 Cong. Rec. 16489, and the provisions to which he referred authorized trial courts to allow "in addition to any judgment . . . a reasonable attorney's fee." I NLRB, *Legislative History of the LMRDA* (1959), at p. 657.

Further evidence that Congress did not contemplate fee awards against unions (as distinct from fee awards out of "the recovery") is that § 501(b) does not authorize the plaintiff to join the union as a party.[14] It is hardly conceivable that, had Congress intended fee awards against unions, it would not have provided for their joinder in § 501(b) actions.

That Congress resisted proposals that would have allowed fee awards exceeding the recovery is hardly surprising. The whole purpose of a § 501(b) action is to restore to the union's treasury monies that have been misappropriated. To allow fee awards exceeding the recovery would produce precisely the opposite result: not only would the misappropriated monies not be restored, but the net effect of the § 501(b) action would then be to drain still further monies from the union treasury.

In the face of clear statutory language, and clearly manifested legislative intent, the court below has ruled—as have the other lower courts that have addressed the question[15]—that fees may be awarded in § 501(b) actions directly against unions, and in amounts exceeding

---

[14] The lower courts have uniformly held that, as the language of § 501(b) suggests, the plaintiff in a § 501(b) action may not name the union as a party. See, *e.g.*, *Head v. Brotherhood of Railway, Airline & Steamship Clerks*, 512 F.2d 398 n.1 (2d Cir. 1975); *Sabolsky v. Budzanoski*, 457 F.2d 1245, 1249 (3rd Cir.), *cert. denied*, 409 U.S. 853 (1972).

[15] In addition to the decision below, see *Local No. 92, Int'l Assn. of Ironworkers v. Norris*, 383 F.2d 735 (5th Cir. 1967); *Monzillo v. Biller*, 735 F.2d 1456, 1463 (D.C. Cir. 1984); *Usery v. Local 639 Teamsters*, 543 F.2d 369, 382 n.34 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Kerr v. Shanks*, 466 F.2d 1271, 1277-78 (9th Cir. 1972); *Bakery & Confectionery Workers Int'l v. Ratner*, 335 F.2d 691, 696-97 (D.C. Cir. 1964); *Highway Truck Drivers & Helpers Local 107 v. Cohen*, 220 F. Supp. 735, 737 (E.D. Pa. 1963).

the recovery. The rationale of these courts is that such awards are justified by the "common benefit" exception to the American Rule against fee-shifting. But these decisions cannot be squared with this Court's holding in *Fleischmann*.

In *Fleischmann*, this Court held that the common benefit exception cannot be invoked in a statutory cause of action where Congress, in creating the cause of action, has "expressly provide[d] the remedies for vindication of the cause." 386 U.S. at 720. The prevailing plaintiff in *Fleischmann*, a suit under the Lanham Act (which contained no attorney's fee provision), sought a fee award in reliance on the common benefit exception. In holding the exception unavailable, the Court reasoned as follows:

> The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting. For, in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. It provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances . . . . When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied . . . [S]everal attempts to introduce . . . a [fee] provision into the Lanham Act have failed of enactment. We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies

> is inappropriate in this context. [386 U.S. at 719-21; footnotes omitted].

This case is controlled by *Fleischmann*. Here, Congress *did* include a fee provision in the statute, but it is a narrowly circumscribed provision. It authorizes an award of fees only out of "the recovery"—an authorization that does not encompass the award made here. And efforts within Congress to secure a broader fee provision failed of enactment (see p. 16, *supra*). Thus, as in *Fleischmann*, it "must [be] conclude[d] that Congress intended [§ 501(b)] to mark the boundaries of the power" to award fees in § 501(b) cases. 386 U.S. at 721.

The obligation of the courts to limit the availability of fees to those expressly authorized in § 501(b) has been made even clearer by this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975). The Court there emphasized the courts' duty to adhere to the particular restrictions Congress has placed upon the availability of fees in those instances where Congress has authorized them:

> What Congress has done . . . is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves . . . Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine. [421 U.S. at 260-62; footnotes omitted].

The court below declared *Fleischmann* inapplicable because "[t]he remedies provided under § 501 of the LMRDA do not approach the specificity of those considered in *Fleischmann*" (App. 14a). But this Court has described § 501(b) as a narrowly-drawn provision which "specifically authorize[s] . . . limited remedies." *Hall v. Cole*, 412 U.S. 1, 10 (1973). And one of those "limited

remedies" is a carefully and deliberately worded provision authorizing a fee award only out of "the recovery." The existence of a specific fee provision in § 501(b) is not a ground for distinguishing *Fleischmann*, as the court below supposed (App. 15a), but rather makes this case *a fortiori* from *Fleischmann*.

Because this issue arises with frequency in § 501(b) actions (n.15, *supra*), and the lower courts' rulings have the incongruous effect of converting § 501(b) into a mechanism for depleting rather than restoring union treasuries, the apparent inconsistency with *Fleischmann* warrants this Court's attention.

B. Even on the hypothesis that § 501(b) does not foreclose common benefit awards in all cases, the holding below that entitlement to such an award existed here would warrant this Court's attention. For the court below has articulated justifications for such an award that would be applicable in *every* successful § 501(b) case. Those justifications are simply the "private attorney general" rationale dressed up with a different name. And the Sixth Circuit, in a case with which the decision below admittedly conflicts, has rejected them for that very reason.

The lone remedy in this case was an order that the defendants pay USWA $14,461.30. There was no injunction or other remedy in the case. But the court below declared that USWA's members secured two "nonmonetary" benefits from this lawsuit for which they should be made to pay a fee three times that amount: (1) the plaintiffs' victory taught USWA that its auditing controls for preventing and/or detecting misappropriations were not foolproof, and (2) USWA was shown by this lawsuit the importance of suing wrongdoers itself. The court below reasoned that this "incentive to change" (App. 19a) constitutes a lesson to USWA for which its members should pay tuition.

But these "benefits" would be conferred in every successful § 501(b) action. And as the Sixth Circuit explained in *Shimman*, 744 F.2d at 1235 n.13:

> Since there was no injunction in this case, the benefits received by other union members were achieved not by direct operation of the judgment, but rather were the result of a realization that the union would have to reform itself or risk exposure to further liability. Society as a whole always benefits through general deterrence when the law is enforced. Allowing a fee award based on such benefits, however, would come close to accepting the "private attorney general" rationale, which was rejected by the Supreme Court in *Alyeska*. The common benefit theory should not be allowed to merge into the private attorney general approach. [744 F.2d at 1235 n.13.]

As the court below acknowledged, *Shimman* "refused to shift fees in just this sort of case" (App. 19a), but the court below "decline[d] to apply *Shimman* to this case" (*id.*).

C. The decision below is not only a distortion of the "common benefit" exception, it flies in the teeth of the central objective of § 501(b): to prevent the squandering of unions' assets. For if USWA were foolish enough to "learn" the lessons that the court below thought it had been taught, the result would be financial imprudence.

USWA's decision not to sue in this case was the only economically rational choice: from the outset, it was clear that the "maximum possible recovery . . . was in the area of $50,000.00" (App. 36a)—and, of course, the actuality was a recovery less than one-third that. But the fees USWA would have had to pay to prosecute this case would have substantially exceeded $50,000, let alone the $14,460 that is all that was ultimately recovered (App. 34a). Thus if USWA learned from this case the lesson that it should always sue whenever there is reason to suspect misappropriation, regardless of the amount at

stake and without taking into account cost-benefit considerations, its members would be the clear victims. The court below recounted the union's evaluation that "the way it handled the matter instead of filing suit"—*i.e.*, invoking the Department of Labor's investigative powers—was "more beneficial to the Union" (App. 49a). Yet without declaring that evaluation inaccurate, the court below required the union to pay for the counter-lesson supposedly taught by this suit.[16]

Similarly, the lesson USWA supposed learned that its procedures for auditing strike funds are not foolproof against misappropriation—even if the supposition were not contrary to the undisputed record evidence (n.6, *supra*)—hardly means that changing those procedures would be economically rational. The undisputed evidence was that USWA's procedures have been overwhelmingly successful in assuring the safeguarding and proper expenditure of USWA funds, and the misappropriations that occurred at this now-defunct local were an aberration. In these circumstances, any alteration in procedures inevitably would carry a cost in excess of what could be saved in consequence.

It is considerations such as these that Congress must weigh in determining whether, and if so on what terms, to authorize fee-shifting in statutory causes of action. Congress' deliberate limitation of fee awards under § 501(b) to a portion of the recovery reflects that Congress did not want the central purpose of § 501(b)—the preservation of union assets—undercut by fee awards exceeding the amount of the recovery on bases such as

---

[16] Of course, a union might opt to bring a seemingly economically irrational lawsuit simply to send a message to local union officers generally that misappropriations in small amounts will not be ignored. But the alternative course followed here by USWA—which resulted in the criminal prosecution of the alleged wrongdoers (see n.3, *supra*)—surely sent a stronger message, and at no cost to USWA.

those employed by the courts below. *Fleischmann* and *Alyeska* teach that those congressional judgments must be respected by the courts.

D. The combined effect of the rulings below—allowing suits such as this to be brought by persons who have no stake in the union's treasury, and authorizing fee awards that exceed the amount of the recovery—is to create a fertile breeding ground for suits motivated principally, if not solely, as attorneys' quests for fees. While, as we have shown, each of the rulings merits this Court's consideration in its own right, their conjunction represents a complete distortion of Congress' objective in enacting § 501(b): to preserve union treasuries for the benefit of the union members.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
JAMES D. ENGLISH
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

Attorneys for Petitioners

86-372

No.

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BERNARD KLEIMAN
JAMES D. ENGLISH
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
APPENDIX A—Opinion of United States Court of Appeals for the Eleventh Circuit (April 8, 1986)	1a
APPENDIX B—Judgment of United States Court of Appeals for the Eleventh Circuit (April 8, 1986)	22a
APPENDIX C—Opinion of the United States District Court for the Middle District of Alabama (Nov. 27, 1984)	23a
APPENDIX D—Opinion of the United States Court of Appeals for the Eleventh Circuit (Dec. 24, 1981)	40a
APPENDIX E—Order of the United States Court of Appeals for the Eleventh Circuit (March 19, 1982)	52a
APPENDIX F—Opinion (Order) of the United States District Court for the Middle District of Alabama (June 30, 1980)	53a
APPENDIX G—Opinion (Order) of the United States District Court for the Middle District of Alabama (July 21, 1980)	62a
APPENDIX H—Statutory Provisions Involved	66a
Sec. 3(o), LMRDA, 29 U.S.C. § 402(o)	66a
Sec. 501(b), LMRDA, 29 U.S.C. § 501(b)	66a

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7455, 84-7774

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs-Appellees,
Cross-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellants,
Cross-Appellees,

UNITED STATES FIDELITY & GUARANTY CORP.,
Defendant-Cross-Appellee.

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs-Appellees,
Cross-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellants,
Cross-Appellees,

U.S. FIDELITY & GUARANTY CORP.,
Defendant,

UNITED STEELWORKERS OF AMERICA,
Defendant-Appellant,
Cross-Appellee.

April 8, 1986

Appeals from the United States District Court
for the Middle District of Alabama

Before HILL and CLARK, Circuit Judges, and MOYE *, Chief District Judge.

CLARK, Circuit Judge:

All parties below have appealed from the district court decision in this suit for an accounting of union funds under § 501 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501(a), (b). Elbert Erkins and Samuel Denson, plaintiffs below, were members of Local 7326 (Local), United Steelworkers of America (USW), when the Local struck plaintiffs' employer, American Building Co. in Eufaula, Alabama. The strike lasted from December, 1976 until May, 1978, when employees voted to decertify USW as their bargaining representative. During the course of the strike, USW provided the Local with a strike fund of $405,000. Billy Bryan, Arthur Comer, George Bullard and Charlie Greene, defendants below, were either Local officials or prominently involved in directing picketing and other strike efforts. Together, these four individuals received $140,000 from the strike fund in payment for various expenses incurred on behalf of the Local.

Soon after the strike ended, plaintiffs challenged the propriety of these payments, especially in view of the fact that defendants had acquired significant items of personal property during and after the strike while many other union members were struggling just to meet household expenses. Plaintiffs investigated the use of strike funds by defendants and in January, 1980, they requested that USW bring suit against defendants for misapplication of union funds. When USW instead referred the case

---

* Honorable Charles A. Moye, Jr., Chief U.S. District Judge for the Northern District of Georgia, sitting by designation.

to the Department of Labor, plaintiffs sought leave to bring suit on behalf of the union in federal court. Leave was granted and suit was filed on May 1, 1980, two years after the end of the strike.

In their suit, plaintiffs sought recovery of the $140,000 in payments, either from the individual defendants or from their indemnitor, United States Fidelity and Guaranty Corporation (USF & G). In addition, plaintiffs requested an award of $305,000 in attorney's fees, payable by the defendants or intervenor, USW. After a three day non-jury trial, the district court ordered a recovery of $14,461.30 from the individual defendants, payable to USW. The court held that plaintiffs' delay in joining USF & G had discharged the indemnitor from any liability under the bond, and recovery could be had only from the individuals. In a separate order, the court awarded plaintiffs $42,000 in attorney's fees, payable by USW. 598 F. Supp. 240.

The parties present the following issues on appeal. Defendants argue that the strict court erred in finding plaintiffs had standing to sue as union "members" under § 501(b) of LMRDA. Defendants contend that the statutory definition of union "member" must yield to each union's definition of membership and plaintiffs would not be considered members by USW standards. Alternatively, defendants urge that this suit is time barred under recent Supreme Court precedent applying a six-month statute of limitations to cases brought under federal labor law. Intervenor USW joins in defendants' arguments and furthermore contests the order to pay $42,000 in attorney's fees. USW contends that the district court's use of the common benefit theory of fee awards is clearly at odds with the language and legislative history of § 501(b), which limits fee awards to the amount of money recovered in an accounting suit (here only $14,461.30).

Plaintiffs for their part assert error in the district court's order to recover only $14,461.30. Plaintiffs con-

tend that the district court arbitrarily approved numerous payments not properly accounted for by defendants; thus, they request a judgment for the full $140,000 paid to defendants. Furthermore, plaintiffs contend that USF & G was erroneously found discharged from the fidelity bond since USF & G did not prove prejudice from the delay in being joined as a defendant. Lastly, plaintiffs' attorneys argue that the district court erroneously awarded only 12% of their requested fee by arbitrarily reducing the number of hours billed, the hourly rate and eliminating the contingency factor.

We affirm the district court order and thus, reject all these contentions.

I. *Plaintiffs' Standing Under § 501*

Section 501(a) provides that "the officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is therefore, the duty of each such person . . . to hold [the organization's] money and property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a). Section 501(b) provides that "any member of the labor organization" may sue a defaulting union officer in federal court "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). Defendants argue that plaintiffs were not members of USW at the time of suit and therefore cannot sue for an accounting. Our consideration of this issue is foreclosed by the decision of a prior panel in an interlocutory appeal in this case. *See Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981) (*Erkins I*). That panel held that plaintiffs were USW members at the time of filing suit and thus had standing to sue. Since findings of fact and conclusions of law by an appellate court bind all subsequent proceedings on the same case, absent exceptional circumstances, we find that plaintiffs

have standing. *See Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984).

II. *Statute of Limitations for § 501 Accounting*

Defendants assert that the district court erred in refusing to apply the six-month statute of limitations of the National Labor Relations Act (NLRA) to the present action. Neither § 501 nor the LMRDA specifically provide a period of limitations. When confronted with such legislative omissions, federal courts ordinarily adopt the most analogous state statute of limitations. An exception to this rule occurs when state law would contradict the purposes of the federal law or policy at issue; in that case, courts look to related federal statutes or doctrines. *See UAW v. Hoosier Corp.*, 383 U.S. 696, 703-704, 86 S.Ct. 1107, 1111-1112, 16 L.Ed.2d 192 (1966). Defendants urge that the recent Supreme Court decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 5, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), requires this court to apply the NLRA statute of limitations in this case.

DelCostello involved a hybrid action brought under federal labor law by a disgruntled union member against his employer for breach of the collective bargaining agreement and against the union for breach of its duty of fair representation. The suit against the employer was brought under § 301 of the National Labor Relations Act, 29 U.S.C. § 185. The suit against the union was brought as an unfair representation claim pursuant to 29 U.S.C. § 158(b). The Supreme Court selected a federal rather than state limitation for the case based upon several considerations: the Court found no closely analogous state limitations; federal labor policy in this context required particularly prompt resolution; and the interplay of hybrid claims, one part (the unfair labor practice claim) having an extremely short express federal limitation (6 months under § 10, 29 U.S.C. § 160(b)), argued

for a single federal limitation when combined. *See* 462 U.S. at 171, 103 S.Ct. at 2294. Thus, the Court applied the six-month limitation normally applicable to unfair labor practices, *see* 29 U.S.C. § 160(b), and emphasized that such a result properly balances "the national interest in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system." 462 U.S. at 171, 103 S.Ct. at 2294 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981)). The Supreme Court noted, however, that nothing in the *DelCostello* analysis should upset the traditional rule of *UAW v. Hoosier, supra*. *See* 462 U.S. at 171, 103 S.Ct. at 2294.

In this circuit, the rationale of *DelCostello* has been applied in two contexts other than a hybrid action, and defendants argue that these cases should control our decision here. The first such case is *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir. 1984) (*Erkins II*), a pure breach of fair representation claim brought by the instant plaintiffs and based on the failure of the union to negotiate with the employer during the strike which spawned the present case. The *Erkins II* panel applied the NLRA limitation for unfair labor practices because a fair representation claim bears a close resemblance to an unfair practice and thus implicates the very balance of interests at issue in *DelCostello*. *See* 723 F.2d at 838-39.

Following *Erkins II*, another panel relied on *DelCostello* in *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985). *Davis* involved abuse of free speech rights protected by 29 U.S.C. § 411(a)(2), part of the "Bill of Rights of Members of Labor Organizations." The panel noted that the *DelCostello* analysis did not compel the use of the NLRA limitation because free speech claims do not implicate the collective bargaining structure as do unfair

practices and thus, do not require uniform limitations or expedited resolution. *See* 765 F.2d at 1514. Rather, the panel found that the expulsion of the plaintiffs from the union was based upon friction between the local union and the international union which threatened stable bargaining relationships between the international union and the steel industry. Referring to *DelCostello*, the panel opinion stated: "We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." *Id.* at 1514. Further, the panel found no analogous state cause of action.

The cause of action under consideration here is quite different from those described and we conclude that the limitation period for filing a § 501 action is not governed by *DelCostello*, *Erkins II*, or *Davis*. Plaintiffs in this lawsuit sought an accounting for union funds allegedly diverted to personal use by the individual defendants. There is no claim against a union or an employer. Consequently, neither the collective bargaining process nor stability of labor union relations is involved.[1]

---

[1] We distinguish the rulings of other circuits applying the six-month NLRA limitations on similar grounds. *Local Union 1397 v. United Steelworkers*, 748 F.2d 180, 184 (3d Cir. 1984), concerned alleged violations of LMRDA clearly implicating labor management relations. Local Union officials had been disciplined for disagreement with international union officials about "pollution control in steel plants, collective bargaining strategy, construction of new plants, arbitration policies" as well as "internal union governance." 748 F.2d at 182. In *Vallone v. Local Union 705*, 755 F.2d 520 (7th Cir. 1984), union members likewise brought suit under LMRDA for free speech violations occurring in connection with a dispute about modifications of the labor contract. *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984), involved failure to provide copies of the collective bargaining agreement to union members disputing their discharge from union construction work. The link between labor-management stability and LMRDA is clear in all these cases but not in the instant case.

Since this § 501 suit is not controlled by the rationale of *DelCostello* and its progeny, the district court declined to apply the NLRA limitation. Instead, the district court applied the federal equitable doctrine of laches and still found the suit timely filed. In so doing, the court recognized another exception to *UAW v. Hoosier's* suggested reliance on state statutes of limitations. Policies underlying the creation of federal equitable claims are not well served by applying rigid limitations; therefore, federal courts considering federal equitable claims should rely on equitable principles. *See Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed.2d 743 (1946). Since a § 501 suit for an accounting is essentially equitable in nature, *see Local 92, International Association of Bridge Workers v. Norris*, 383 F.2d 735, 741 (5th Cir. 1967) laches is an appropriate test for timeliness. *Accord Morrissey v. Curran*, 482 F. Supp. 31, 40 (S.D.N.Y. 1979); *Yablonski v. UMW*, 80 L.R.R.M. (BNA) 2594 (D.D.C. 1971). The district court in turn correctly applied the doctrine, finding that plaintiffs' May 1, 1980 filing caused no undue prejudice to defendants and therefore the suit was timely filed. *See EEOC v. Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir. 1982) (laches requires unequitable delay in filing and undue prejudice to defendants).

III. *Misapplication of Strike Funds*

Plaintiffs on cross-appeal assert that the district court erred in its calculation of misspent funds. They contend that defendants should remit all $140,000 paid them since the expenses or compensation claimed were never supported by records, receipts or independent corroborating testimony. Plaintiffs consider the failure to keep records a *per se* breach of fiduciary duty under § 501.

Such a position ignores Congress' admonition that courts must "take into account the special problems and functions of a labor organization" when construing fidu-

ciary duty under § 501. *See* 29 U.S.C. § 501(a). Imposing liability on the mere failure to keep receipts would ignore the fact that strike leaders are neither accountants nor comptrollers; their positions as union leaders demonstrate their organizational rather than financial expertise. The district court employed a more appropriate legal standard. A union official fulfills his fiduciary duty, even though he may indirectly benefit from use of union funds, whenever he can show that the funds were authorized by the union and were expended for the benefit of the union. *See Ray v. Young*, 753 F.2d 386 (5th Cir. 1985); *Morrissy v. Curran*, 650 F.2d 1267 (2d Cir. 1981).

The district court correctly applied this rule with regard to each category of contested payments. Plaintiffs disputed the fact that defendant strike leaders received far more than the $20 to $30 per week strike benefit paid rank and file members. The lower court found most of these payments authorized and reasonable simply because defendants spent far more time and effort promoting the strike and boycott than other union members.[2] Not only did their efforts benefit the union, they precluded defendants from working elsewhere to meet their household expenses. Conversely, the lower court disallowed a number of third party payments as unauthorized by union rules and manifestly unreasonable since such payments would not have been made to rank and file members and the union received no benefit from the payments.[3]

---

[2] For example, defendant Billy Bryan, former president of the Local, worked twelve to sixteen hours per day, five to six days a week on strike maintenance. Charlie Greene acted first as assistant and then principal treasurer for the strike fund, working three to four days each week. These men, as well as the other defendants, also made numerous trips in support of the strike and boycott.

[3] These third party payments included strike fund checks negotiated, for example, to pay for clothing, household goods, and auto repairs on cars not used for union business.

The trial court took a creative, but certainly not inequitable, approach in reviewing the final category of payments, those for travel expenses. These payments cannot be disallowed as a matter of law since there is no showing that defendants' trips were unauthorized. Indeed, defendants must have incurred some expense since plaintiffs failed to show that any of the trips did not take place. Personal benefit occurs only if the pre-trip expense money was not completely spent on the single trip for which it was issued. Any overage would be unauthorized and manifestly unreasonable since defendants would have been overcompensated. *See Ray v. Young, supra* at 392, (double reimbursement for expenses voids authorization and requires reimbursement). The trial court's use of an average time, distance and cost for each challenged trip seems an acceptable means, in the absence of specific records, or determining whether defendants were overcompensated for trip expenses. Approximation is necessary as a matter of equity where plaintiffs have failed to disprove the fact of a trip. The court's function in a § 501 accounting is not to impose, through the penalty of reimbursement, specific record keeping procedures. Courts should intervene in a union's financial affairs only when authorized payments are "significantly above a fair range of reasonableness." *Morrissey v. Curran, supra* at 1275. Thus, we affirm the district court order to return $14,460 to the international union.

IV. *Attorneys' Fees*

A. Setting the Appropriate Fee

Plaintiffs' attorney assert several errors by the district court in its calculation of their fee. First, they claim that unrebutted affidavits regarding hours and hourly rates were improperly ignored. Second, they claim that the court failed to increase basic fees to reflect the contingent aspects of the case, despite case law authorizing such upward adjustment. Third, they suggest that

cutting the already diminished fee by an additional 60% contradicts the lower court's finding of substantial non-monetary benefits produced by this suit. Despite these arguments, we affirm the fee award of $42,000.

Section 501(b) of the LMRDA authorizes the award of reasonable attorney fees and expenses in cases such as this one.[4] The district court has properly considered plaintiffs' attorneys' request for $203,587.50 in fees, plus an enhancement of 50%, for a total of $305,381.25. Plaintiffs claim that 1,749 hours were spent on the case at an average rate of $116.40. Plaintiffs' three attorneys claimed individual hourly rates of $125 (out-of-town counsel) and $80 (local counsel). The district court relying on *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir.1974), eliminated about one-third of the hours claimed as unnecessary, duplicative or poorly documented. Next, the court selected $90 as the appropriate hourly fee since plaintiffs' affidavit listed local community rates within a range of $75 to $200. This figure is not clearly erroneous and is consistent with the dictates of *Johnson, supra.* Indeed, the district court merely employed a sense of "billing judgment" customarily used in private practice. *See Hensley, supra* at 1940. Thus, the district court correctly found a starting point fee of $90,000 to $100,000.

Furthermore, the district court clearly did not err in refusing to enhance the starting point or "lodestar" fee. Plaintiff's attorneys cite the following justification for enhancement by 50%: complex legal issues, high risk of loss, substantial time investment with low probability of compensation, important values at stake, and potentially

---

[4] 29 U.S.C. § 501(b) provides: "The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

large monetary and non-monetary benefits to USW members. The Supreme Court recently rejected such reasons for enhancement. *See Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The *Stenson* Court found that novelty and complexity are reflected in the number of hours expended; additional compensation is merely "double counting." 104 S.Ct. at 1549. Further, the benefits resulting from this litigation do not justify an enhancement of the starting point fee. To the contrary, the results support the district court's reduction of the fee.

We find that the district court correctly decreased the fee award from a maximum starting point of $100,000 to only $42,000. The Supreme Court has recognized that the quality of results obtained is an "important factor" in reaching a final fee amount. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . . If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley, supra* at 1940-41. Plaintiffs certainly did not obtain excellent monetary results here as only 10% of the amount sought was actually obtained. Indeed, the trial court found that at most $50,000 constituted questionable payments. In undertaking any case counsel is obligated to consider the amount involved, the merits of the client's cause, and the chance of success at the outcome of the representation. Here plaintiffs sought recovery of $140,000 in the lawsuit but requested $305,000 in fees at the conclusion of the case. Fees of $300,000 or even $100,000 are inappropriate where only $15,000 is recovered. In *Blum v. Stenson, supra*, the Supreme Court specifically held that enhancement of a fee is permissible where there is exceptional success. As part of the same reasoning, it must be accepted that fees have to be reduced on occasion when the result

was less than a success, as occurred here. The result had to have been foreseeable by counsel and they have to share some of the loss along with plaintiffs, as the converse would be true if exceptional success had been achieved. We refuse to give any credit for the contingency factor, since counsel failed to properly appraise the case at the outset. Also, in considering the level of success, we note that counsel failed to join timely defendant USF & G so that it would have been available as a defendant to contribute to a possible settlement. The district court properly considered *Johnson*, *Hensley*, and *Blum*, and reached an appropriate fee award.

The court's award is, moveover, consistent with prior cases under § 501. *See Local 92, International Association of Bridge Workers v. Norris*, 383 F.2d 735 (5th Cir. 1971); *Highway Truck Drivers v. Cohen*, 220 F.Supp. 735 (E.D.Pa.1963). Plaintiffs' counsel cite no cases in which the spread between fees and recovery are as great as that requested in this case. In fact, the award in this case is more generous than those cited above. Here, plaintiffs' counsel will receive three times the monetary recovery; in *Cohen*, the attorneys received half that much; and in *Norris*, they received less than the award itself. To the extent the fee exceeds the recovery, counsel has been compensated for the non-monetary as well as the monetary benefits produced by their efforts on plaintiffs' behalf.

B. Union's Liability for Fees

USW, the union beneficiary of all funds recovered by plaintiffs in this suit, intervened to limit the fee award. Under the terms of the statute, the union has an opportunity to prosecute plaintiff's claim of misapplied funds. If the union declines and the claim proves meritorious nonetheless, the union may be required to pay the cost of plaintiff's efforts. USW asserts that even if plaintiff's have recovered $14,460 in union funds, the inter-

national union should not be required to pay more than that amount for plaintiff's attorneys' fees. The district court held to the contrary, citing the former Fifth Circuit opinion *Local 92 v. Norris*, 383 F.2d 735 (5th Cir.1967). *Norris* held that an international union could be liable for attorney fees if the misapplied funds had not yet been returned to the union. Additionally, *Norris* held that the fees could exceed the recovery. Under the rule of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), we are bound by the holding of *Norris*.

USW claims that recent Supreme Court rulings on attorney fee awards, principlly *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), and *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), have rendered *Norris* non-binding precedent in this circuit. *See County of Monroe, Florida v. Davenport of Labor*, 690 F.2d 1359 (11th Cir.1982) (prior panel decision is not binding when contradicted by intervening Supreme Court precedent). Furthermore, USW argues that the holding in *Norris* ignores the plain language and history of the statute, which clearly limits fee awards to the amount of the recovery.

First, we cannot agree that *Fleischmann* and *Aleyska* have undermined *Norris'* precedential value. In both cases the Supreme Court declined to authorize an award of attorney fees when the federal statute which was the basis of the lawsuit did not authorize such an award. *Fleischmann* holds that where Congress has set out a detailed scheme of remedies for a statutory cause of action, courts may not expand those remedies on the basis of general equitable principles. *See* 87 S.Ct. at 1408-09. The remedies provided under § 501 of the LMRDA do not approach the specificity of those considered in *Fleischmann*, an action for trademark infringement under the Lanham Act. The latter statute provides for injunction and recovery of damages, defendant's profits, and costs including fees for clerks, marshals, court reporters, wit-

nesses, printing, copying and docket fees. *See* 28 U.S.C. § 1920. Notably omitted is any reference to attorney fees. Section 501(b) provides that plaintiffs may sue for an accounting, damages or "other appropriate relief" and provides for an award of attorney fees. While this language is more specific than that of other sections of the LMRDA, *see, e.g.*, 29 U.S.C. § 412 (suit for "such relief (including injunctions) as may be appropriate"), it hardly sets forth the comprehensive remedies found in the Lanham Act. Furthermore, there is no evidence that Congress meant to prohibit equitable remedies under § 501. On the contrary, Congress' reference to an accounting seems an affirmative invitation to rely upon equity in enforcing fiduciary duties. *See Norris*, 383 F.2d at 743. Thus, *Fleischmann* is not authority for our overruling *Norris* and holding that an attorney's fee may not exceed the amount of the recovery.

USW's reliance on *Alyeska* is similarly unpersuasive. In that case the Supreme Court held that courts may not shift attorney's fees simply to encourage private enforcement of legislation in the public interest. *See id.* 95 S.Ct. at 1627. If Congress has not provided expressly for fee-shifting, courts may not fill the gap by rewarding successful plaintiffs for acting as "private attorneys general."

While *Alyeska* may spell the end of fee-shifting in the absence of statutory authorization, it does not control the present case. First, and most obviously, § 501 of the LMRDA expressly authorizes fee-shifting. Second, the Supreme Court's analysis in *Alyeska* focused on the private attorney general concept. *See* 421 U.S. at 260, 95 S.Ct. at 1623. It could not deal with the common benefit theory, the principle at issue in this case, because under the facts of *Alyeska*, fees could not be shifted to the direct beneficiaries of the suit.[5] Thus, the holding of

[5] The plaintiffs in *Alyeska*, several environmental groups, had sought to prevent construction of the trans-Alaska pipeline by

Alyeska in no way impairs the holding of *Norris*. Indeed, fee-shifting in excess of the recovery under § 501 has survived *Aleyska* intact. The District of Columbia Circuit, for example, has implicitly reaffirmed such fee-shifting in post-*Alyeska* cases. *See, e.g., Usery v. Local 639, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C.Cir.1976) (noting that *Aleyska* did not impair the common benefit theory used in LMRDA cases); *Monzillo v. Biller*, 735 F.2d 1456 (D.C.Cir.1984).

While we affirm that *Norris* remains good law, we also point out that its allowance of fees in excess of judgment is fully consistent with the legislative purpose of § 501. As the Supreme Court has noted, the LMRDA reflects "calculated ambiguity [and] political compromise" rather than a precise congressional directive. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 1949 n.17, 36 L.Ed.2d 702 (1973) (quoting Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich.L. Rev. 819, 852 (1960)). The better guide to statutory construction here is Congress's ultimate purpose in legislating, not its "plain language."[6] *See id.* The

---

bringing suit against the Secretary of the Interior. The groups sought an injunction against issuance of permits facilitating the acquisition of land for the pipeline. *See* 421 U.S. at 242-45, 95 S.Ct. at 1614-15. At the close of litigation, the District of Columbia Circuit directed the pipeline company to reimburse one-half of the plaintiffs' attorneys' fees. *See id.* at 1616. Consequently, the cost of litigation would have been borne by the pipeline's customers but the benefits of enforcing the environmental laws at issue would have redounded to the general public.

[6] This response to the "plain language" argument applies equally well to USW's argument on legislative history. USW relies on the fact that from the Senate floor, prior to passage, Senator Goldwater criticized the legislation on this very point. He noted that the language of section 501 differed from that in other parts of the bill, the latter specifically authorizing fees in addition to, rather than as a portion of, the monetary recovery. *See* 105 Cong. Rec. 16489 (daily ed. Aug. 20, 1959) (statement of Sen. Goldwater). Senator Goldwater warned that this difference would inhibit mem-

LMRDA's purpose is to impose fiduciary duties on union leaders and to remove disincentives to enforcement of those duties by union members. *See Bakery Workers v. Ratner*, 335 F.2d 691, 696 (D.C.Cir.1964). Strictly limiting fees to the amount recovered would frustrate that purpose. *See id.*

Nowhere is this realization clearer than in the courts' routine allowance of fees in suits for injunction or other non-monetary relief under LMRDA. *See, e.g., Monzillo v. Biller*, 735 F.2d 1456 (D.C.Cir.1984) (suit for injunction); *Marshall v. United Steelworkers*, 666 F.2d 845 (3d Cir.1981) (suit to overturn election results); *Usery v. Local 630, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C.Cir.1976) (intervention in suit to overturn election results). Such fee-shifting is based on the common benefit theory, the equitable principle which requires that those who directly benefit by litigation must reimburse the successful plaintiff's costs or stand unjustly enriched. *See Usery, supra* at 382 (citing *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed.2d 1184 (1939)).

Since neither Supreme Court precedent nor congressional intent limit the scope of § 501(b), we reject USW's contention that fee-shifting in excess of the recovery is always impermissible. Rather, we find such relief necessary to effect the equitable goals of § 501. Nonetheless, fees above the recovery are not automati-

---

ber enforcement since the cost of litigation could exceed the fund recovered. USW concluded that since neither house amended the bill to conform section 501 with other sections, Congress intended to strictly limit fees to the amount of the recovery. While USW's research is sound, its conclusion is faulty. It is true that Congress generally acts for a reason, and often for reasons set forth in the legislative history, but we can never be sure, in the absence of an explicit statement, why Congress fails to act. Any conclusions about legislative intent drawn from the sequence of events merits the same skepticism due the plain language of the statute.

cally shifted simply because they represent a reasonable amount under the *Hensley-Stenson* factors discussed at part IV A, *supra*. To shift the excess, the plaintiff must prove that litigation confers significant non-monetary benefits on those persons who will ultimately pay the fees. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Furthermore, those fees must spread the cost proportionally among those who benefit. *See Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226, 1235 (6th Cir.1984) (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970)).

Proportionality of cost and benefit is obvious here, since the strike funds were actually provided by USW and USW would both recover them and pay the fees under the district court order. As the District of Columbia Circuit has noted, payment of fees by the union under LMRDA is a quintessential example of proportionality: there is "a close match between the party assessed and the beneficiary of the litigation." *See Usery, supra* at 383. Thus, we reject USW's claim that only the defunct Local will benefit from this suit. In reality, neither the Local nor the plaintiffs will realize a penny.

Substantial non-monetary benefits from the suit are less obvious, but not clearly erroneous. The district court found two. First, the suit exposed the practical flaws in USW's strike fund accounting procedures. Second, plaintiffs' ultimate recovery demonstrates that USW cannot rely on Department of Labor investigations to find fiduciary breaches in Local affairs. USW considers these benefits insubstantial because it plans no change in accounting procedures nor has the court ordered any. Thus, the so-called "benefit" would only "result [from] the realization that the union would have to reform itself or risk exposure to further liability." *Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226, 1235 n.13 (6th Cir. 1984). USW suggests that we

follow the Sixth Circuit, which has refused to shift fees in just this sort of case because the benefit, in its opinion, is no different from results achieved under the private attorney general theory.

We decline to apply *Shimman* to this case. *Shimman's* primary benefit, in the sum of $225,000, ran solely to the named plaintiff, compensating him for assault and battery and violation of his free speech rights. Any incentive for change in union policy was largely ancillary to plaintiff's personal recovery. Here, in contrast, the monetary recovery, as well as the incentive to change, directly concerns USW rather than the plaintiffs. Furthermore, we do not find such incentive an insubstantial benefit. Substantiality does not rest on compulsory reform or injunctive relief. The District of Columbia Circuit has found substantial benefits as the result of preliminary injunctions and the mere filing of suit for such an injunction. *See Yablonski v. UMW*, 466 F.2d 424 (D.C. Cir. 1972). Compulsion was not possible in *Yablonski* since the merits were never reached, yet, the court found a benefit and shifted fees. Similarly, that circuit and the Third Circuit have found benefits sufficient to shift fees where the plaintiff has only intervened in a suit brought by the Secretary of Labor. *See Marshall v. United Steelworkers*, 666 F.2d 845 (3d Cir. 1981); *Usery v. Local 639, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C. Cir. 1976). The benefits were said to be the intervenor's unique perspective on the case and the possibility he might discover new evidence or develop legal arguments for the Secretary's litigation. *See Marshall*, 666 F.2d at 853; *Usery*, 543 F.2d at 383-84. Certainly, if the intervenor's contributions constitute a benefit sufficient to shift fees, plaintiffs' impeachment of USW's strike fund accounting provides a substantial benefit to the members of USW. Thus, we affirm the district court order that USW pay $42,000 for plaintiffs' attorneys' fees.

V. *Liability Under the Fiduciary Bond*

The final issue on appeal concerns the extent of recovery under USW's fiduciary bond for the defendants. Section 502 of LMRDA requires that "every officer, agent . . . or other representative or employee of any labor organization . . . who handles funds or other property thereof shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty." 29 U.S.C. § 502(a). USF & G, defendant below, had bonded the defendant officials of the Local. Although USF & G was not originally a party to this suit, plaintiffs learned of the USF & G bond about one month after the suit was filed. The bonding company was not joined as a defendant, however, until three years after filing. After a trial on the merits, the district court found that plaintiffs could not recover from USF & G because they had failed to meet the notice and claim provisions of the bonding contract.

Plaintiffs claim error in the district court's finding. They contend that rank and file union members cannot be barred from recovery for failure to comply with notice and claim provisions. *See Giordani v. Hoffman*, 295 F. Supp. 463 (E.D. Pa. 1969); *Purcell v. Keane*, 277 F. Supp. 252 (E.D. Pa. 1967). Although *Giordani* and *Purcell* allowed claims in spite of failure to comply with the bond provisions, those cases are not controlling here. Since the bonding companies had been jointed in the original complaints in those cases, prejudicial delay was not at issue. Here, plaintiffs delayed for three years after they received actual knowledge of the bond's existence; during that time, they never inquired as to the bond's provisions. Plaintiffs claim they were distracted by the hotly contested issue of standing to sue. While distraction certainly is possible, it is no excuse for failure to diligently pursue all claims arising from the misapplication of strike funds. *See United Klans v. McGovern*, 621 F.2d 152 (5th Cir. 1980) (once plaintiff has inquiry notice

of claims, statute of limitation begins to run). Contrary to plaintiffs' assertions, prejudice to USF & G from this delay in joinder is certainly not speculative. USF & G was denied the opportunity to challenge plaintiffs' standing under § 501, to argue for or against intervention by USW, and to participate in much of the discovery prior to trial. We conclude, therefore, that plaintiffs' claim against USF & G is barred for lack of due diligence. We affirm the district court's finding.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Caption Omitted in Printing]

Before HILL and CLARK, Circuit Judges, and MOYE*, Chief District Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby, AFFIRMED;

It is further ordered that each party bear their own costs on appeal.

Entered: April 8, 1986

For the Court: Spencer D. Mercer, Clerk

By: Deputy Clerk

ISSUED AS MANDATE:

---

* Honorable Charles A. Moye, Jr., Chief U.S. District Judge for the Northern District of Georgia, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. ALABAMA, N.D.

Civ. A. No. 80-180-N

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs,

v.

BILLY BRYAN, and ARTHUR COMER, and
GEORGE BULLARD, and CHARLIE GREENE

Nov. 27, 1984

William I. Grubb, II, Eufaula, Ala., Thomas M. Jacobson, Milwaukee, Wis., Walter Kelly, Milwaukee, Wis., for plaintiffs.

Jerome A. Cooper, Birmingham, Ala., for defendants.

MEMORANDUM OPINION

HOBBS, District Judge.

This action was commenced under Section 501(b) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501 (1975), by two members of Local 7326, United Steelworkers of America, against defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Greene. Plaintiffs alleged that said defend-

ants breached their fiduciary duties owed to Local 7326 by misappropriating strike funds for their own personal benefit in violation of 29 U.S.C. § 501(a). After conducting a three day trial without a jury, the Court concluded that the union was entitled to reimbursement from the defendants in the amount of $14,461.30, plus costs and interest.

This cause is now before the Court on the motion of plaintiffs for an award of attorneys' fees. Plaintiffs' attorneys contend that they are entitled to $305,381.25 as compensation for the services rendered to their clients in this law suit. Under LMRDA, 29 U.S.C. § 501(b), plaintiffs seek to recover these fees jointly and severally from defendants and from the United Steelworkers of America. The Court has reviewed plaintiffs' motion, accompanied by the time sheets of plaintiffs' attorneys and supporting affidavits, in light of the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and in light of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.C.t 1933, 76 L.Ed.2d 40 (1983). Consideration of these decisions, together with the facts of the instant case, leads the Court to conclude that plaintiff's are entitled to $42,000.00 in attorneys' fees.

I. *Factual Background*

Elbert Erkins and Samuel Denson, plaintiffs in the above-styled action, were rank and file members of the United Steelworkers of America (International) and of its affiliate, Local 7326. Defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Green were also members of the International and Local 7326. During the relevant times herein, each defendant occupied at one time or another a position of fiduciary responsibility in Local 7326.

From December 1976 through May 1978, approximately three hundred members of Local 7326 engaged in a strike against their employer, the American Buildings

Company of Eufaula, Alabama. This strike commenced at the expiration of the employment agreement between Local 7326 and the company. It was prompted by the company's demand for new terms in the collective bargaining agreement.

During the eighteen month strike, the International sent a total of $450,000 to the union local, along with instructions that the money be deposited into a special checking account which would contain only strike and defense funds. In order to qualify for benefits from this fund, a striker was required to perform for the union, which usually meant walking a shift at the picket line. In return he would receive a weekly benefit of twenty (later thirty) dollars. A striker could also petition the strike committee to obtain money from the fund to pay bills or other obligations. To obtain this addiitonal assistance, the striker would have to demonstrate an urgent need. The members of the union were instructed at the outset of the strike to exhaust their own financial resources and seek alternative sources of income (e.g., unemployment compensation) before petitioning the committee for assistance. During the course of the strike, literally hundreds of union members' bills were paid from the strike funds.

Despite vigorous efforts by the union, the strike was lost when the employees voted not to be represented by the union at a decertification election. The results of this election became final when the union's objections to the decertification election were rejected by the National Labor Relations Board.

After losing the decertification election, Local 7326 was no longer authorized to represent the employees at the company's Eufaula plant. Since Local 7326 did not serve as the bargaining representative for employees of any other employer, a representative of the International was appointed as administrator to conclude the affairs of Lo-

cal 7326. Following his appointment, Local 7326 ceased to exist for all practical purposes. Funds which were not expended during the strike or during the period when the local's affairs were being concluded by the administrator were eventually returned to the International.

Shortly after the conclusion of the strike, plaintiffs and other union members met with the administrator to discuss whether any of the defendants had misappropriated strike funds. Following this meeting plaintiffs remained suspicious that strike funds had been wrongly appropriated by defendants. They decided to conduct their own investigation. They traveled to Milwaukee, Wisconsin in June 1979 to secure the assistance of Mr. Thomas Jacobson, an attorney. At first plaintiffs were unable to meet the fee demands of Mr. Jacobson. However, they returned in October 1979 with sufficient funds to retain him. After traveling to Eufaula and conducting his own investigation, Mr. Jacobson discovered sufficient information to warrant contacting the International and demanding that the union file suit against the defendants. The International refused and instead forwarded the information provided to it by Mr. Jacobson to the Department of Labor for its consideration.

On May 1, 1980, plaintiffs sought leave from this Court to file suit against defendants under Section 501(b). In their verified proposed complaint, plaintiffs asserted that defendants committed numerous violations of their fiduciary obligations as officers or representatives of Local Union 7326. The verified proposed complaint requested an accounting and reimbursement of any misappropriated strike funds. The Court heard testimony from the plaintiffs and determined that the good cause requirement of Section 501(b) had been satisfied. The Court also found that plaintiffs had satisfied the statutory requirement of making a demand upon the International to bring suit against defendants. Because the

International had refused to sue the defendants, this Court allowed plaintiffs to proceed with their complaint.

On June 12, 1980, the International filed a motion to intervene in this lawsuit for the special purpose of seeking to vacate this Court's order allowing plaintiffs to commence this action. The Court allowed the International to intervene for this limited purpose. When at a hearing plaintiffs, through their attorney, conceded that they were not union members at the time suit was filed, this Court held that plaintiffs lacked standing to bring this suit, and, therefore, withdrew its leave to file suit. 494 F. Supp. 732. Plaintiffs appealed, and the Court of Appeals reversed, holding that plaintiffs remained "members" of the union within the meaning of Section 501(b). *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981), *cert. denied*, 459 U.S. 989, 103 S.Ct. 343, 74 L.Ed.2d 384 (1982).

Plaintiffs also sought to bring a class action alleging that the union breached its duty of fair representation. This Court held such suit was time barred. Plaintiffs appealed to the Court of Appeals, which affirmed this ruling. Plaintiffs also were instrumental in having a federal suit brought against these same defendants for criminal conversion. After a lengthy trial, the defendants were acquitted of the criminal charges by a jury verdict.

After the conclusion of the criminal case, plaintiffs presented evidence in this civil suit over the course of three days regarding the travel expenses, strike benefits, and payments for personal expenses that defendants had received from the strike and defense fund. Out of the $450,000 allotted for the three hundred members of Local 7326, the four defendants received thirty-one percent of the funds, or $140,000.

It is undisputed, however, that the four defendants remained as leaders of the strike for substantially its en-

tire duration of eighteen months. Their duties as leaders of the strike precluded them from obtaining other work, whereas most of the other union members obtained other jobs within a few weeks or months of the beginning of the strike. Moreover, all of the defendants made many trips to other states in aid of the strike, and much of the money which they received from the defense fund was by way of reimbursement for such travel expenses.

The documentation presented by plaintiffs to substantiate charges of abuse and mismanagement by defendants included over two hundred checks that plaintiffs had selected to challenge as having been issued to one or more of the defendants in breach of their fiduciary duty. The Court notes that in order to secure this judgment against defendants, plaintiffs had to overcome difficult legal and factual obstacles that arose during the course of this protracted litigation.

II. *Attorneys' Fees*

A. *Extent of Union Liability*

A threshold question for this Court to consider in arriving at a reasonable figure for attorneys' fees is whether the Court will show plaintiffs' award to exceed their recovery in the case. The question is an important one in a case where plaintiffs claim attorneys' fees of $305,387.25, and their judgment amounted to only $14,461.30.

The statutory provisions governing attorneys' fees in actions brought under the Labor-Management Reporting and Disclosure Act is § 501(b) of the Act. This section provides that a trial judge

> may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b). The International interprets this section to mean that the amount recovered by plaintiffs becomes the fund out of which the Court may allot "a reasonable part" as attorneys' fees, so that the fees can never exceed the recovery. The union argues that the legislative history supports its position. Moreover, the union argues that plaintiffs are seeking to impose on the union the obligation to pay hundreds of thousands of dollars in a law suit where it is not even a party. Its only participation has been by way of limited intervention (1) to oppose the bringing of the law suit for its alleged use and benefits, and (2) to oppose plaintiffs' efforts to collect staggering attorney fees from the union.

Plaintiffs argue that so restrictive an interpretation of the LMRDA provisions does not take the Act's broad purposes into account. LMRDA establishes fiduciary obligations for union officers who occupy positions of trust in a labor organization. 29 U.S.C. § 501(a). When these duties are violated, the Act provides criminal penalties for those who embezzle union funds. § 501(c). It also allows members of the union to file a civil suit for an accounting of union assets. § 501(b). Congress, in enacting LMRDA, remarked that

> A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organiaziton are entitled to a full accounting of all transactions involving their property.

Senate Comm. on Labor and Public Welfare, Labor-Management Reporting and Disclosure Act of 1959, S.Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2324.

Whatever may be the merits of the proper interpretation of the intention of Congress, courts have consistently

rejected the unions' contentions that counsel fees should be limited to the amount of the monetary recovery. *Local No. 92 v. Norris*, 383 F.2d 735, 742 (5th Cir. 1967); *Bakery and Confectionery Workers Int'l v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964); *Highway Truck Drivers & Helpers Local 107 v. Cohen*, 220 F. Supp. 735 (E.D. Pa. 1963). Awards have been based on the theory that the union has benefitted from the results of the litigation initiated by plaintiff. Under this theory, the benefits of the litigation may accrue to unions that were not formal parties in the case, and may exceed the monetary recovery in cases where plaintiffs obtained a favorable, non-monetary benefit for the union. *Id.* In no case, however, has the claim for attorney fees been so disproportionate to plaintiff's potential or actual recovery as in the instant case.

In *Bakery and Confectionery Workers Int'l v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964), for example, the court referred to "the establishment of proper accounting procedures, the calling of a convention for membership expression and control, and the requirement of conformity by the officers with the International constitution" as possible benefits for the Bakery and Confectionery Workers that would merit an award of counsel fees. The monetary recovery, observed the court, may constitute a source for the payment of counsel fees, but the recovery is not the exclusive source for these fees. 335 F.2d at 696-97.

In the present case, the Court is of the opinion that plaintiffs conferred some benefit upon the union which is in excess of their monetary recovery. This lawsuit benefitted the International in two respects. First, it demonstrated to the union that the International's elaborate system for controlling expenditures of its general funds [see Declaration of Thomas Striegel] existed only on paper in regard to Local 7326. Defendants administered over $450,000 of union funds, but did not maintain adequate records of their expenditures, and misappropriated $14,461.30.

Second, the case pointed out the need for union officials to take their fiduciary obligations seriously, and vigorously to investigate charges of wrongdoing by local officials. Before plaintiffs instituted this action, they met with union officials and asked them to investigate plaintiffs' charges that defendants had abused their positions of trust in the local union. The International seemingly refused to investigate, and at all events refused to file suit against defendants, electing to forward the information it had received from plaintiffs to the Department of Labor. There is every reason to believe that if the International had elected to conduct its own internal investigation of the local and to file suit, the same results achieved by plaintiffs could have been attained at much less cost than the cost claimed by plaintiffs. To the extent, however, that the International allows itself to be put in a position where third parties enforce its fiduciary obligations and investigate charges against local officers, judicial decisions binding on this Court require that the International must be prepared to pay for all or a part of this outside help, even if the costs exceed the monetary recovery.

B. *Determination of Fee Award*

Having decided that plaintiff's attorneys are entitled to an award of fees, the Court must now determine the amount that counsel should receive. Plaintiffs have the burden of proving to the Court that they are entitled to an award of attorneys' fees. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974). They have submitted affidavits and time sheets in support of their claim that they should receive the sum of $305,381.25. Plaintiffs arrive at this figure by multiplying the hours that three of plaintiff's attorneys worked on this matter times the hourly rate for each attorney. This results in a total of $203,587.50. Plaintiffs then increase this figure by a factor of fifty percent, a fee enhancement that plaintiffs claim is appropriate in this case.

In evaluating plaintiff's motion, the Court has paid particular attention to *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Hensley* teaches that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 103 S.Ct. at 1939.

The figures that plaintiffs have submitted to the Court on this issue are as follows:

Thomas M. Jacobson (1045.50 hrs at $125)	$130,687.50
Thomas M. Jacobson (travel, 93 hrs at $25)	2,325.00
Walter F. Kelly (483 hrs at $125)	60,375.00
William I. Grubb (127.50 hrs at $80)	10,200.00
TOTAL (without 50% enhancement)	$203,587.50

Plaintiffs have also included itemizations of the time that counsel have spent on this case, along with supporting affidavits from local attorneys regarding plaintiffs' hourly rates. In these affidavits, the attorneys state their belief that plaintiffs' request are reasonable and the local attorneys charge anywhere from $75 to $200 per hour for services similar to those performed by plaintiffs' counsel.

The Court believes that counteraffidavits and discovery could possibly form the basis for challenging whether all of counsel's time was reasonably spent, but this Court is mindful of the Supreme Court's admonition in *Hensley* not to turn the attorney fee petition into a second major trial. Already the time claimed for the fees of plaintiffs' attorneys is many times the amount in controversy. Accordingly, this Court will review plaintiffs' submissions in light of the Court's experience as a member of the local bar for approximately thirty years and as one who

routinely has set fees for lawyers in litigation in this Court for the past several years, taking such aid as the affidavits filed by the parties afford.

The Court is of the opinion that if the only consideration in setting fees in this case is the number of hours reasonably spent by plaintiffs' attorneys times an appropriate hourly rate, plaintiffs would be entitled to an hourly rate of $90 per hour. Fees awarded by this Court have ranged from $40 an hour for beginning attorneys to as much as $100 an hour in a contingent fee case with excellent results for a skillful, prevailing attorney. This Court recognizes that plaintiffs were represented by able, dedicated attorneys.

After reviewing counsel's itemizations, the Court believes that some of the time listed was unnecessary, duplicative or poorly documented. For example, plaintiff had three attorneys present throughout the trial; defendants had one. But defendants are asked to pay for lawyers for their adversaries which clearly they could not have afforded for themselves. This Court recognizes that three attorneys at a trial may be helpful, but this Court has held that such a luxury as even two counsel at a trial should not be paid for by the losing party where defendants were represented by only one attorney—particularly is this true where defendants have very limited resources. *Joyner v. AAA Cooper Transportation Co.*, CA No. 82-884-N (M.D. Ala. Mar. 8, 1984), and see *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717 (5th Cir. 1974). This Court is satisfied that much of the work of the attorneys outside the courtroom was also duplicative even where the attorneys sought to limit the amount of duplicative work.

A careful scrutiny might afford a basis for challenging some of the hours claimed on a basis other than duplicative hours. For example, the record of Mr. Kelly is itemized entirely in one hour increments, and the accom-

panying explanation in some cases does not seem to justify the amount of time claimed. But this Court is satisfied that the attorneys for plaintiffs have spent hundreds of hours productively on this case. If the amount in controversy and the results achieved justified fees based on the simple arithmetic of multiplying hours productively employed, times a reasonable hourly rate for plaintiffs' attorneys, the Court would conclude that the fee should be no less than $95,000 to $100,000. The Court has reduced the amount that plaintiffs may require the union and/or the defendants to pay for plaintiffs' attorneys based on the results obtained and the amount in controversy.

Johnson v. Georgia Highway Express, 488 F.2d at 717, notes the factors that should be considered by the district court in arriving at an appropriate fee.

(1) *Time and labor required:* The Court has concluded that plaintiffs' attorneys spent more time than was reasonably required to prosecute this case successfully, but that plaintiffs' attorneys spent a thousand or more productive hours in representing their clients.

(2) *The novelty and difficulty of the questions:* The case presented a novel question on the issue of standing that was resolved in favor of plaintiffs on appeal. *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981). In addition, plaintiffs' proof depended on the difficult chore of assembling and reviewing numerous checks in an effort to make sense out of the Local's chaotic financial records. Beyond the complexities of the accounting, the trial itself represented no novel or difficult questions.

(3) *The skill requisite to perform the legal service properly:* Attorneys for plaintiff demonstrated skill and tenacity in persevering in the representation of their clients, despite many obstacles which they had to overcome.

(4) *The preclusion of other employment by the attorney due to acceptance of the case.* Counsel's representation of plaintiffs did not create any conflicts of interest which hindered their ability to represent other clients, nor did it impose upon the time of attorneys involved to an unusual degree.

(5) *The customary fee.* The Court has answered this question in its discussion of an appropriate hourly rate.

(6) *Whether the fee is fixed or contingent.* The *Johnson* court employs this variable as an aid to the Court "in demonstrating the attorney's fee expectations when he accepted the case." 488 F.2d at 718. Plaintiffs have asked the Court to view the fee as contingent and add 50 percent to a generous hourly rate by way of enhancement. The Court recognizes some merit in the argument of plaintiff's counsel that the $10,000 retainer fee (which, counsel inform the Court, was spent on expenses) should not alter the substantial contingent nature of the fee agreement in this case. A case in which an attorney is paid ten thousand dollars as a retainer is not entirely contingent, but in view of the hundreds of hours expended by plaintiffs' attorneys, the ten thousand dollars was clearly inadequate payment and the representation should invoke consideration similar to a contingent fee case. *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc).

(7) *Time limitations imposed by the client or the circumstances.* The Court is not aware of any unusual time constraints in this matter.

(8) *The amount involved and the results obtained.* The Court is of the opinion that, considering the amount involved, no attorney could reasonably have believed that he would be entitled to a $300,000 fee in this case if his own client were paying the bill. The total amount of money received by all defendants from the strike fund was $140,000. Plaintiffs realized from the start that

defendants were entitled to a large part of this money for work they performed during the strike and for urgent expenses which were paid for them as for other union members. The maximum possible recovery for plaintiffs at the outset of the trial was in the area of $50,000.00.

Plaintiffs' attorneys might well have anticipated that they would expose mismanagement in the union, which would benefit the International, and serve as additional justification for the suit. The level of mismanagement, however, was directly related to the amount of funds misused by defendants. In this respect, plaintiffs should have been alerted that the amount of their attorney fees involving three attorneys with two of them from more than a thousand miles distance from the trial, was out of all proportion to the potential recovery.

Admittedly, plaintiffs had difficulty in marshalling the evidence to prove their case in large part because of the inadequate records and memories of defendants. Nevertheless, if the maximum possible recovery was somewhere in the area of $50,000, the actual results obtained, $14,461.30, were a good deal less.

If plaintiff succeeded on some of his claims, but failed to succeed on others, the time spent pursuing the unsuccessful claims is not compensable if the unsuccessful claims are not related to the successful ones. *Hensley*, 103 S.Ct. at 1940. On the issue of whether plaintiffs' claims were related, the Court will treat all claims as related. None of plaintiffs' time will be disallowed for unsuccessfully pursuing an unrelated claim.

(9) *The experience, reputation, and ability of the attorneys.* The quality of counsel's representation has already been noted in determining an appropriate hourly rate. This Court recognizes that plaintiffs were represented by able, dedicated attorneys.

(10) *The "undesirability" of the case.* The Court does not believe that counsel will suffer economic hardship resulting from their representation of plaintiffs in this matter, or that the case was "undesirable" except for the length of time from the filing of the suit to its conclusion and the travel involved for all of plaintiffs' attorneys.

(11) *The nature and length of the professional relationship with the client.* Plaintiffs' attorneys did not have a prior relationship with their clients.

(12) *Awards in similar cases.* Judgments in two similar cases have been roughly equivalent to plaintiffs' monetary judgment. In *Local No. 92 v. Norris,* 383 F.2d 735 (5th Cir. 1967), plaintiffs obtained a judgment of $22,896.01, and received attorneys' fees of $15,729.47. In *Highway Truck Drivers v. Cohen,* 220 F. Supp. 735 (E.D. Pa. 1963), plaintiff received a verdict of $24,921.44, and $38,000.00 in attorneys' fees.

The twelve factors listed above are not accorded equal weight in arriving at a reasonable fee. Under *Hensley,* "the most critical factor" used in evaluating the product of the attorneys' reasonable hours times a reasonable rate is the results obtained by plaintiff. 103 S.Ct. at 1941. In this case, the fee award has been primarily influenced by the fact that plaintiffs did not achieve a level of success that would make the hours reasonably expended a satisfactory basis for making the fee award. *Id.* at 1940. The Court in *Hensley* noted that where "plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." 103 S.Ct. at 1941.

For example, in *Earl v. Bealieu,* 620 F.2d 101 (5th Cir. 1980), a Truth-in-Lending Act case, plaintiff's recovery was $220, and plaintiff sought, $1,020 for plain-

tiff's attorney fees. The court in *Earl* limited the attorney fees to the amount of the recovery; i.e., $220. The court emphasized that the basis for so limited an award was "the amount involved and the results obtained." *Id.* at 103.

In cases such as this one, where the fee awarded exceeds the amount of the judgment, the Court believes that there should be a relationship between the two. In *Pearson v. Colonial Financial Services, Inc.*, 530 F. Supp. 599 (1982), a case brought before this Court, plaintiff sought attorneys' fees from the losing party which were fifteen times her recovery. Plaintiff received an award of attorney fees in excess of her judgment, but this award was for $6,000 in fees to plaintiff's attorneys rather than the $31,594.00 which had been sought. In rejecting most of plaintiff's claim for attorney fees, this Court made it clear that the primary reason was that the claimed fee was out of proportion to the amount in controversy and to the results obtained. *Id.* at 602.

In the present case, the union has made a strong argument based on legislative history that the union cannot be required to pay a fee in excess of the amount recovered. Judicial precedent deemed binding on this Court has held that the union can be required to pay in excess of the amount of the judgment. The Court notes, however that plaintiffs are seeking attorneys' fees and costs which are more than twenty times the amount of the judgment. These fees and costs are $290,000.00 greater than the monetary benefit to the union, in a case that was allegedly brought for its benefit.

In ruling on plaintiff's petition, this Court has tried to establish a correlation between the amount of the judgment and the amount awarded for attorneys' fees. If no such correlation is required, the fee to be awarded could become a devastating weapon with which to bludgeon settlements. 530 F. Supp. at 601. In a hypothetical case,

an attorney could demand that a union pursue a claim against a former officer of a defunct local union. The union may know that the former officer is insolvent. It may also know that it would cost far, far more to pursue the claim than the claim is worth. Nevertheless, the union must sue the former union officer over even trivial amounts. This could hardly have been the intent of Congress, nor would it be in the public interest.

After a review of the legislative history of LMRDA, this Court has found no indication that Congress, in allowing third parties to enforce the fiduciary obligations of union officials, intended that these parties should hold such a club to coerce decisions of a labor organization. The union should be allowed to exercise its own judgment regarding the merits of a suit without the fear of being forced to pay staggeringly large attorneys' fees which are not related to the expected recovery. In light of these considerations, the Court will order, by separate judgment, that defendants and the union are jointly liable for attorneys' fees to plaintiffs in the amount of $42,000.00.

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

Dec. 14, 1981

Appeal from the United States District Court
for the Middle District of Alabama

Before TUTTLE, HENDERSON and HATCHETT, Circuit Judges.

TUTTLE, Circuit Judge:

By this appeal we are required to construe and apply the provisions of the Landrum-Griffin Act, particularly 29 U.S.C. § 501(b) when persons alleging themselves to be members of a local union seek permission of a United States district court to file an action against former officers of the local alleging misappropriation of union funds, in which action the prospective plaintiffs seek to make a recovery for the benefit of the union.

This section provides:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b).

The petitioners, here the appellants, filed their petition with the district court seeking permission to file their suit as members of Local 7326 of the International Union, United Steel Workers, alleging that several former officers had, during a strike in which the petitioners had participated, embezzled and misappropriated money furnished to the Union by the International for strike benefits. The petition alleged that the petitioners were, at the time, members of Local 7326. They alleged sufficient facts which would have supported a complaint alleging misapplication of funds as outlined in § 501(b). They also

alleged that they had "made demand by letter to United Steel Workers of America [their international union] to take the necessary action to prevent any further union funds from being misused by defendants for the above-mentioned purposes, and to take immediate steps, by filing court action, to recover from the individual defendants the funds the defendants have wrongfully expended." They alleged the officers of the International had failed under a reasonable time to take such action. Based on such application, sworn to by the parties and presented to the court ex parte as is permitted under the statute, the trial court entered its order granting leave to file the petitioners' complaint.

Thereafter, after granting leave to the named respondents to delay the filing of their response, the trial court set down for a hearing a motion by United Steel Workers of America for permission to intervene for the purpose of moving the court to revoke its order permitting the filing of petitioners' complaint. This motion to intervene was supported by a long affidavit by the associate general counsel of the United Steel Workers of America, who outlined the usual procedures for the handling of the affairs of locals which are in similar circumstances to Local No. 7326. Neither the petition to intervene nor the Frankel affidavit categorically stated that the petitioners were no longer "members" of the union. This affidavit was extensively answered by counsel for petitioners prior to the hearing conducted by the trial court. The court did not enter an order allowing the intervention, but considered the pleading and affidavit as though it had done so.

The historical facts necessary for us to consider the correctness of the trial court's order revoking its original grant of permission to the petitioners to file their complaint are not in dispute. The membership of Local 7326 consisted entirely of production and maintenance employees employed by American Buildings Company in

Eufaula, Alabama. As of January 1, 1978 there were approximately 300 workers employed in the plant. There was a similar number of members of the Local in December of 1976, at the time of the expiration of the most recent collective bargaining agreement between the Local and the Company. Following the expiration of that agreement, USW commenced a strike against the Company over the terms of a proposed new agreement. The strike was authorized by a vote of the membership of Local 7326. It proved to be a long, bitterly contested struggle which was lost in the end of the Union. In support of the strike the AFL-CIO declared a boycott of the Company's products. The Local lost the right to represent the Company's employees following its defeat in a National Labor Relations Board decertification election conducted on May 18, 1978. This election became final by the Board's certification of the results of the election on July 14, 1978.

Local 7326 did not serve as collective bargaining representative for employees of any other employer than American Building Company. Thereupon, by letter dated July 14, 1978, the director of the district of USW in which Local 7326 was located requested that an administrator be appointed for Local 7326. This was apparently done under the provisions of Article IX of International's constitution which provides "in the event the International president shall have reason to believe any local union is failing to comply with any provision of the constitution, or that action may be required for one of the purposes specified in the following paragraph, the International president may, unilaterally or at the request of officers or members of the local union, institute proceedings . . . which may after appropriate hearings result in suspending or revoking the charter of any such local union." Included as one of the purposes mentioned above for which such action can be taken is "otherwise carrying out the legitimate objects of the International union or

such local." Presumably, in the opinion of the district director, such administrator was to be appointed because, in the language of the general counsel's affidavit: "This is the usual *first step* in a procedure followed in cases where locals have ceased to represent any employees." [Emphasis added.]

Following this appointment, the parties apparently agree that Local 7326 has been dormant; no dues have been paid and no meetings have been held. There apparently have been no collective bargaining or other union activities.[*]

The International contends that under these circumstances, the petitioners were no longer "members" of the Union. Petitioners, on the other hand, contend that until the charter has been revoked, the administrator has completed his audit and the funds have been properly disbursed, they are still members of the Local and of the International. They further contend that even if they were not technically "members" at the time the suit was filed, they nevertheless should be treated as "members-in-substance" and be permitted to file the complaint as members.

Although the petitioners, in their opposition to the trial court's reconsideration of its order granting permission to file the complaint, included a paragraph quoting from the Landrum-Griffin Act section under "definitions" dealing with "members," the trial court did not mention this definition in its disposition of the case. It held in effect, that the decertification brought about the dormancy of the Local which resulted in the loss of membership by all of its previous members, including the petitioners. It held that since they were not technically members they were not qualified under the statute to file such a complaint. The court bolstered its determi-

---

[* The original opinion contained the following sentence at this point, which was stricken by subsequent order, see *infra* App. 52a: "Petitioners are still employees of American Buildings Company"].

nation of this issue by equating the status of a "member" under § 502 with that of a former stockholder in a derivate suit, citing in support of this theory, *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). This Court has held that a former stockholder is not qualified to bring an action on behalf of his corporation under Fed. R.Civ.Proc. 23.1. *Schilling v. Belcher*, 582 F.2d 995 (5th Cir. 1978), where we stated: "Only a shareholder, by virtue of this 'proprietary interest in the corporate enterprise,' " *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321, 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may " 'step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own.' "

The difficulty with this reasoning is that this statute makes a "member" of the union a statutory representative "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). It is thus not necessary that the petitioners in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members, the law says they have the standing to conduct litigation.

Moreover, it is appropriate when considering the meaning of the words in § 501(b) to look at the definition section of Chapter 11, of which this section is a part. This definition section is found at 29 U.S.C. § 402, in which it is stated:

> For the purposes of this chapter . . . ¶ O "member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the Constitution and bylaws of such organization.

The proof before the court at the time of the hearing was that these petitioners [*] had not voluntarily withdrawn from membership and they had not been expelled or suspended from membership. It is difficult to understand, therefore, how the International can contend that they were not "members" of the Local at the time the suit was filed. When it was creating a new right in "members" of a union, it was surely within the power of Congress to say "for the purposes of this Chapter we now say who is a member." This is the precise language of the statute.

The effect to be given to this definition has been ably described by the Court of Appeals for the Seventh Circuit:

> As is apparent from the choice of terms, Congress did not limit the protections of the Landrum-Griffin Act to those whom the union recognizes as members. Rather, one who has fulfilled the membership requirements, that is, one who is a member in substance, is protected. *Hughes v. Local 11, International Association of Bridge, Structural & Ornamental Ironworkers*, 287 F.2d 810, 814 (3d Cir.), *cert. denied*, 368 U.S. 829, 82 S.Ct. 51, 7 L.Ed.2d 32 (1961). There is little dispute that the laid-off employees satisfied the union's membership requirements. There is also little dispute that the laid-off employees were not members in good standing because they had not paid dues since their layoff. But under section 402(c), one who has met the membership requirements remains a member within the meaning of the Act until one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after "appropriate proceedings" held pursuant to

---

[* The original opinion contained the following words at this point, which were stricken by subsequent order, see *infra* App. 52a: "were still employees, they"].

> lawful constitutional or bylaw provisions. *See Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213, 217 & n.6 (7th Cir. 1974). Neither of these events occurred here; the union simply classified the laid-off employees as being no longer in good standing. Since laid-off employees did not voluntarily withdraw and the union did not expel or suspend them, they are "members" and therefore protected by the equal rights guarantees of section 411, subject to the union's reasonable rules and regulations.

Alvey v. General Elec. Co., 622 F.2d 1279, 1284 (7th Cir. 1980).

We recognize that a particular union may have internal rules of membership, but these cannot limit the definition of "member" as contained in the statute that creates a cause of action by a "member." *See Hughes v. Local 11, etc.*, 287 F.2d 810, 817 (3d Cir. 1960). In any event, there is nothing in the constitution [1] of the International that is inconsistent with the definition of "member" in the statute. The assistant general counsel's affidavit, as quoted above, simply states that the administrator, William Caldwell, "took over the affairs of the local upon his appointment. This is the usual first step in the procedure followed in cases where locals have ceased to represent any employees." Article IX provides that when an administrator is appointed for a local union, he

> shall have the right to demand and receive in the name of the International union, and the local union officers shall have the obligation to turn over, the charter and all books, records, monies, assets and

---

[1] Parts of the constitution were quoted in affidavits of the International. Petitioner moved this Court to supplement the record by receiving the entire constitution in evidence. This was not objected to by the International. We, therefore, grant that motion.

> property of the local union, *to be held in trust for the local union* and to be used and expended only in the proper conduct of *its* affairs. The administrator shall have the right to replace officers, grievants or other committee members or stewards removed by the International executive board or the administrator, by appointing temporary officers, grievants or other committee members or stewards. [Emphasis added.]

Thus, it is plain that the appointment of an administrator does not in and of itself terminate the Local. Since the Local cannot exist without members, it seems clear even under the constitution, that the persons who are in good standing upon the date of the appointment of the administrator continue to be members unless they are subsequently suspended or expelled or elect to "voluntarily withdraw."

The record is silent as to what activities the administrator engaged in during the 18 months between the time he took charge and the filing of the petition now before the Court. It is clear, however, that the charter had not been surrendered or canceled by the International, no proceedings had been started against any members looking towards their expulsion and none of them had voluntarily withdrawn from membership. The record discloses that there was some $2,000 in the treasury of the Local at the time the administrator was appointed and the record is not at all clear that pending the final winding up of the Local's affairs these funds belonged to the International as distinguished from the Local for whom, under the language quoted above, they were "to be held in trust . . . and to be used and expended only in the proper conduct of its affairs."

The International further claims, however, that an ingredient in the trial court's decision granting such a petition is that there must be a finding that there had been a showing of "good cause." The International contends

that the way it handled the matter instead of filing suit as outlined in the statute itself would have been more beneficial to the Union than to have acted as requested by the members. This, of course, cannot establish a want of good cause, because the language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring such suit. The trial court could not second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. The trial court found that this precondition had been satisfied.

In its motion to the trial court to vacate its original order, the International stated that one of its purposes was to "enable the Court to consider the matter of plaintiff's compliance with the jurisdictional prerequisites to this action and the question of 'good cause' under 29 U.S.C. § 501(b) on the basis of a full record." Upon the trial court's reconsideration, responding to such motion, the court did not withdraw or modify its earlier determination that the preconditions other than that of membership had been satisfied. It held only that the membership requirement had not been satisfied and made this the basis of its withdrawal of its earlier order.

Whatever may ordinarily be the requirement of the section as to the establishment of good cause, we are satisfied that it was adequately established in this case, once we have determined that these petitioners were members as contemplated by the Act. *See, e.g., Horner v. Ferron*, 362 F.2d 224 (9th Cir. 1966) and *Dinko v. Wall*, 531 F.2d 68 (2d Cir. 1976), which comments on *Horner v. Ferron* as the "most extensive treatment of good cause" to be found. Rather than accepting the standard of *Dinko* that the good cause requirement in § 501(b) means "that plaintiff must show a reasonable likelihood

of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence," we associate ourselves with the standard of the Court of Appeals for the Ninth Circuit as announced in *Horner, supra.* There, the Court said:

> Thus if the defendant can establish by undisputed affidavit, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or that the action cannot succeed because of the application of the principles *res judicata* or collateral estoppel, or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application.
>
> However, we think it inappropriate to consider, at such a hearing, defenses which require the resolution of complex questions of law going to the substance of the case. Defenses of this kind should be appraised only on motion for summary judgment or after a trial. Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of summary judgment procedure, are *a fortiori*, beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken. [Footnotes omitted.]

362 F.2d at 229.

Under such a standard, we conclude that good cause was shown in this case.

Upon the filing of the motion by the law firm of Cooper, Mitch and Crawford, for a delay within which to plead to the original complaint, the petitioners filed

their motion "to disqualify the law firm of Cooper, Mitch and Crawford and any and all individual attorneys therein from providing legal service of any nature to the named defendants herein." The motion also sought an order "enjoining the United Steel Workers of America from engaging legal counsel or retaining legal counsel on behalf of the individual defendants herein." The grounds for the alleged disqualification were the assertions by the petitioners that the said law firm had represented the Local in proceedings before the National Labor Relations Board prior to the decertification order and that the International should be enjoined from otherwise providing counsel because of a conflict of interest, pursuant to the Labor Management Reporting and Disclosure Act of 1959. The trial court did not pass on these motions. They remain to be dealt with upon remand.

The trial court's order of June 30, 1980, 494 F.Supp. 732, withdrawing the leave to file a complaint previously granted on May 1, 1980 is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

March 19, 1982

On Petition for Rehearing, 663 F.2d 1048, and Suggestion for Rehearing En Banc; Truman M. Hobbs, Judge.

Before TUTTLE, HENDERSON, and HATCHETT, Circuit Judges.

PER CURIAM:

The statement contained in the opinions that "petitioners are still employees of American Building Company," appears not to be supported by the evidence in the record. It is therefore stricken from the opinion.

The Petition for Rehearing is DENIED.

No member of this panel or Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 25), the suggestion for Rehearing En Banc is DENIED.

APPENDIX F

UNITED STATES DISTRICT COURT
M.D. ALABAMA, N.D.

Civ. A. No. 80-180-N

ELBERT ERKINS, and SAMUEL DENSON,
and PERRY CULPEPPER,
Plaintiffs,

v.

BILLY BRYAN, and ARTHUR COMER, and
GEORGE BULLARD, and CHARLIE GREENE,
Defendants.

June 30, 1980

ORDER

HOBBS, District Judge.

This case illustrates again the pitfalls of *ex parte* orders; even in those circumstances where Congress by statute has expressly authorized such orders.

The plaintiffs in accordance with Section 501(b) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 501(b)) petitioned this Court for leave to file a complaint against certain officers of Local Union No. 7326 of United Steelworkers of America who allegedly took union funds and expended them for unauthorized and improper purposes including purchases for the personal benefit of said officers. Plaintiffs by this complaint seek to compel the officers of the local union to account for all expenditures made by them out of

union funds and to require the defendant union officials to reimburse Local 7326 and USW for all improper expenditures of union funds made or authorized by them.[1]

Section 501(b) provides as follows:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such

---

[1] USW was granted the right to be heard on its plea for reconsideration of the *ex parte* order of this Court in granting plaintiffs the right to file their complaint for the benefit of USW against officers of Local Union No. 7326. Plaintiffs challenge the right of USW to "intervene" in this proceeding by way of urging such reconsideration, because Rule 24(c) requires that a motion "to intervene be accompanied by a pleading setting forth the claim or defense for which the intervention is sought." Plaintiffs correctly argue that USW has no intention of filing a pleading setting forth a claim or defense. But USW has filed a Motion to Vacate Leave to File a Complaint with accompanying memorandum and affidavits. The Federal Rules of Civil Procedure were not written with the almost unique situation in mind in which a plaintiff must obtain permission of court in order to file a complaint. In the instant proceeding, USW does not desire to join issue on the complaint. It simply desires to question the jurisdiction of this Court under § 501(b) of Title 29 to allow this suit to be brought by these plaintiffs for the benefit of USW.

Although the Court is of the opinion that USW has a right to ask for such reconsideration, if the plaintiffs lack standing to bring this suit, the Court could and should on its own motion, re-examine a ruling where the Court has the independent obligation under § 501(b) to determine prior to the commencement of the suit whether the conditions precedent to bringing the suit have been met. This Court, therefore, does consider the oral arguments advanced by the plaintiffs and counsel for USW as well as the memoranda and affidavits filed by them in determining whether its original order was proper.

> member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

The purpose of allowing suit by union members is "to further union democracy and thereby prevent misuse of power of union leaders." *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). The suit is for the benefit of the union, not its individual members or the named plaintiffs. As is clear from its reading, § 501(b) imposed certain conditions precedent to suit.

First, a demand must be made on the union to bring an action to recover the allegedly misappropriated funds. Plaintiffs made such a demand.

Second, the labor organization must refuse or fail to sue to recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so. The union in this case has failed to sue although it was provided with a letter in mid-December, 1979, requesting an accounting and alleging misappropriation of union funds by officers of Local Union No. 7326. A representative of USW responded to this letter by requesting the basis for the charges against officials of the Local union. In February 1980, plaintiffs sent an affidavit to USW which contained information

suggesting that union funds were misappropriated by local officials. A series of letters were exchanged between the attorney for the plaintiffs and a representative of USW. On March 6, 1980, the representative of USW wrote the plaintiffs' attorney stating that USW had determined to turn the matter over to the United States Department of Labor for investigation of the charges against the Local officers.

USW contends that its action in turning this matter over to the Department of Labor was reasonable and in no way manifests a decision on its part not to pursue the alleged wrongdoers. Although USW's election may be logical and in the best interest of the union, it does not obviate the fact that the union has refused to bring suit after a demand of several months standing. This Court, therefore, finds that the second condition precedent to suit has been met.

The third condition precedent to bringing suit is that the plaintiff be a "member" of the union. The complaint alleges that plaintiffs "were at all times material hereto members in good standing" of Local 7326 of USW. Without question, plaintiffs were members of the union for purposes of § 501(b) during the time of the alleged misappropriation of funds. The USW points out, however, that plaintiffs are not now, and were not at the time suit was filed, members of the union.

Local 7236 went on strike against the only employer employing any of its members in December, 1976. The strike was long and bitter, ending in failure in May, 1978. Thereafter, USW lost the right to represent the company's employees following its defeat in a National Labor Relations Board decertification election conducted in May, 1978. The Board overruled USW objections to the decertification election on July 14, 1978.

Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an

administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit. No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

During the strike, USW placed money in a special strike fund for the use of Local 7326 to cover expenses of the strike and to aid members through the economic hardship of the strike. The Local was responsible for the distribution of these funds, and it is with respect to these funds that plaintiffs charge misappropriation by officers of Local 7326. Pursuant to agreement between USW and its locals, any funds remaining in local strike funds after conclusion of strikes are returned to USW.

All dues paid by members of the USW are the property of USW rather than the local, and in the event of the revocation of a local union's charter or if a local union disbands, all assets of the local are returned to USW. Article IX, Sec. 4, of USW Constitution.

Finally, Article XI, Section 7 of the USW Constitution, provides:

> A member whose membership is terminated shall have no right or interest in any property of the Local Union or of the International Union, including any dues, assessments or other financial obligations paid by such member in advance of the effective date of such termination.

Plaintiffs concede that since they are no longer union members they have no derivative interest in any recovery effected by them on behalf of the union. They insist, however, that they have an interest in righting a wrong which the local union officers inflicted on them and other members of Local 7326. Plaintiffs argue that USW has no interest in stopping wrongdoing of local union officers

and that its action from the time of plaintiffs' original demand for an investigation to the present has been protective of the local officers. Plaintiffs argue that unless they are allowed to prosecute this action, any effort by USW will be feeble at best and will strangle in bureaucratic inertia and dilatory "buck-passing." Hopefully, USW will recognize its interest in pursuing wrongdoing where it occurs on the part of Local officers. The interest of USW in taking strong action to halt the misappropriation of funds provided by it to strikebound Locals would seem obvious.

This Court, however, recognizes the possibility that USW may be less than vigorous in pursuing this matter. However, the issue remains as to whether plaintiffs meet the third condition precedent to suit under 29 U.S.C. § 501(b); i.e., that they be Union members. This Court on re-consideration holds that they do not, and therefore, withdraws its leave to file this action granted herein on May 1, 1980.

Plaintiffs rely on *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968) in support of the proposition that they meet the requirement of union membership imposed by the statute. In *Phillips, supra*, the erstwhile plaintiff was a union member at the time he brought suit according to the Constitution and By-Laws of the Union. The court nevertheless held that he could not bring the suit because he had also joined a rival labor organization and his interest at the time he filed suit was actually antagonistic to the union for which he sought to bring the action, and for purposes of § 501(b), he was not an appropriate person to bring an action for the benefit of the Union.

Plaintiffs' attorney points out that no such antagonistic interest prevails with the instant plaintiffs. They are not members of a rival union. But unlike the plaintiff who was disqualified in *Phillips*, the instant plaintiffs were not members of USW when suit was filed.

In *Phillips, supra,* the court pointed out that § 501(b) gives the union members a right akin to the right of shareholders in a shareholder derivative suit. The Court stated:

> The condition of membership, which is expressly required by the Section, seeks to insure that a representative of the union, the real party in interest, will properly represent the union's interests in the litigation. *Phillips, supra,* at 832.

The plaintiffs in the instant suit, therefore, may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. 7A C. Wright & A. Miller, *Federal Practice and Procedure,* 325 (1972); 19 Am.Jur. 2d, *Corporations,* § 559. A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise.

In *Schilling v. Belcher,* 582 F.2d 995, (5th Cir. 1978), the court considered the standing of a former stockholder to bring an action on behalf of the corporation. At page 999, the *Schilling* court stated:

> Fed.R.Civ.P. 23.1 contains two discrete standing requirements: (1) the plaintiff must have owned stock in the defendant corporation at the time of the transaction of which he complains, the so-called "contemporaneous ownership" requirement, and (2) the plaintiff must be a shareholder of the defendant cor-

poration at the time suit is brought. The latter requirement, unlike the contemporaneous ownership rule, is not expressly stated in the rule, but rather is implied by the statement that an action under Rule 23.1 may be "brought by one or more shareholders . . . to enforce a right of a corporation." Only a shareholder, by virtue of his "proprietary interest in the corporate enterprise," *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may "step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). Thus, it is generally held that the ownership requirement continues throughout the life of the suit and that the action will abate if the plaintiff ceases to be a shareholder before the litigation ends. C. Wright & A. Miller, 7A Federal Practice and Procedure § 1826, at 325 (1972); see *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976); *Niesz v. Gorsuch*, 295 F.2d 909 (9th Cir. 1961); 3B Moore's Federal Practice ¶ 23.1.17, at 23.1-63 (2d ed. 1978); see also Annot., 168 A.L.R. 906 (1947).

The *Schilling* court also quoted from *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735-736 (3rd Cir. 1970) as follows:

> Standing [to bring a derivative action in behalf of a corporation] is justified only by [the] proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest.

Plaintiffs also rely on *Axelrod v. Stoltz*, 264 F.Supp. 536 (E.D.Pa. 1967). In *Alexrod, supra*, the party seeking to bring the suit was suspended from union mem-

bership, and the union contended that it had to take formal action to reinstate the party before he was a "member" within the meaning of § 501(b). The court in *Alexrod* held that Axelrod became a "member" of the union when his period of suspension expired even though the union had not taken any affirmative action to reinstate.

As the *Axelrod* court stated:

> When Axelrod's period of suspension ended, there was no requirement for any proceedings looking to reinstatement. When he tendered dues after the expiration of the suspension period, he had done all that was necessary to the restoration of his benefits and privileges as a union member. The rejection of the tender of dues was improper. *Axelrod v. Stoltz, supra*, at 540.

Thus, the *Axelrod* court recognized the requirement of § 501(b) that in order to maintain the action the plaintiff had to be a member of the union, and it expressly found such membership existed.

Plaintiffs argue that their lack of union membership is through no fault of theirs, but results from the fact that their local union ceased to function. This is obviously true, but this does not give them the standing of "membership" which is required to bring this action. To paraphrase the language of *Schilling, supra*, at p. 1002, "a close reading" of § 501(b) persuades us that Congress "has not chosen to entrust the heavy responsibility of vindicating unenforced" union "rights to a representative who is no longer a member of the class which will benefit or suffer from his actions." Accordingly, it is

ORDERED that leave to file the complaint herein granted on May 1, 1980, be, and is hereby, WITHDRAWN.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 80-180-N

ELBERT ERKINS and SAMUEL DENSON,
and PERRY CULPEPPER,
Plaintiffs

vs.

BILLY BRYAN, and ARTHUR COMER, and
GEORGE BULLARD, and CHARLIE GREENE,
Defendants

[Filed July 21, 1980]

ORDER

This cause is before the Court on plaintiffs' motion for reconsideration filed herein on July 14, 1980. In their motion plaintiffs now state that they do not concede that they were not members of Local 7326 when the complaint was filed. Plaintiffs argue that because the closing audit has not occurred under administratorship, the local union has not been dissolved. Based on this fact, plaintiffs now make the assertion that they are still members of the union for the purpose of construing 29 U.S.C. § 501(b).

The argument presented to this Court orally by plaintiffs' counsel on June 20, 1980, and the documents on

file in this cause simply do not support plaintiffs' present assertion of present membership in the local union.

From the argument reported stenographically and transcribed in part at the Court's request, plaintiffs' counsel again and again acknowledged that plaintiffs were not mebers of the union at the time the complaint was filed. Counsel contended that Title 29, § 501(b) was met if plaintiffs were loyal union members at the time the union was decertified. For example:

> MR. JACOBSON: If Your Honor please, as I recall, when we met in the Court's chambers, I recall distinctly indicating to the Court, and the complaint so indicates, that Mr. Erkins and Mr. Denson and Mr. Culpepper were members of the union at the relevant—what we allege is the relevant period of time, which was up to the time the union was decertified, and that we did indicate to the Court that the union local was no longer in existence, because the strike had been lost and that the local had been decertified, and I do apologize to the Court if I gave the Court the impression they were members at the time of the complaint.

And later:

> MR. JACOBSON: Now, on the issue of membership, which bothers the Court, because clearly they were not members at the time. . .

And later:

> MR. JACOBSON: A common sense reading of what membership has got to mean in this situation, it's got to mean that as far as the strike which ends up in decertification. It is the members in good standing during the strike up to the point of decertification, and none of these plaintiffs, Your Honor, crossed that picket line.

Thus, plaintiffs' counsel conceded that plaintiffs were not union mmebers when suit was filed and argued forcefully that this fact was irrelevant in light of the plaintiffs' undisputed membership when the alleged improprieties occurred.

As stated in this Court's order entered herein on June 30, 1980, vacating leave to file suit granted on May 1, 1980:

> Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit. No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

The union is in a caretaker status until it is accounted for and dissolved, but the fact that this process has not concluded is insufficient to support plaintiffs' newly-found assertion of present union membership nor does that fact have any effect on this Court's determination that plaintiffs lack standing to sue under 29 U.S.C. § 501(b).

Plaintiffs' counsel argued vigorously at the hearing that these plaintiffs were not to blame because they were no longer union members. Plaintiff's counsel insisted that plaintiffs had been loyal members throughout the strike and were loyal members when the alleged wrongs took place. These facts are not in dispute, but they do not give "standing."

The basis for the Court's withdrawal of its right to file the complaint was based upon the plaintiffs' lack of any derivative interest in the outcome of the lawsuit. Any derivative interest these plaintiffs might have had in the outcome of this lawsuit was extinguished on the

decertification of the union and the absence of any activity by the union or by these plaintiffs as union members for eighteen months prior to the filing of this suit. The outcome of plaintiffs' claim in this suit would in no way benefit plaintiffs, whether the process of liquidating the union has been concluded or not. The mere fact that this defunct union has not been liquidated cannot give these plaintiffs a derivative interest in the outcome of the lawsuit. In the opinion of this Court, these plaintiffs are not proper representatives to bring a suit for the benefit of the union. Membership in the union is a clear requirement by Congress when it bestowed the right of action in 29 U.S.C. § 501(b).

Accordingly, it is ORDERED that plaintiff's motion for reconsideration be, and it is hereby, denied.

DONE this 21st day of July, 1980.

/s/ Truman Hobbs
United States District Judge

APPENDIX H

STATUTORY PROVISIONS INVOLVED

Sections 3(o) and 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 402(o), 501(b), provide in pertinent part as follows:

§ 3. *Definitions*

For the purposes of this chapter—

(o) 'Member' or 'member in good standing,' when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

§ 501. *Fiduciary responsibility of officers of labor organizations*

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall

be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-372

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD AND CHARLIE GREENE IN SUPPORT OF THE PETITION

JEROME A. COOPER
Counsel of Record
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576
Attorneys for Respondents, Billy Bryan, Arthur Comer, George Bullard and Charlie Greene

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
SUPPLEMENTAL STATEMENT OF THE CASE	2
CONCLUSION	3

TABLE OF AUTHORITIES

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983)	2
Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401, *et seq.*	1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-372

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENTS BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD AND CHARLIE GREENE IN SUPPORT OF THE PETITION

These respondents adopt and support petitioner's Statement of the Questions Presented; Authorities Cited; Reasons for Granting the Writ; Jurisdiction; and Statutory Provisions Involved.[1]

---

[1] Attention is called to the fact that these respondents have as petitioners filed a petition for certiorari in Case No. 85-2077. Case No. 85-2077 arises from the same decision of the United States Court of Appeals for the Eleventh Circuit as does the petition herein. In addition to those questions here recited by petitioners, the petition in No. 85-2077 presents the important questions: whether an action under Title V of 29 U.S.C. § 501(b) (herein LMRDA) is governed by the same six-months time limitation as are actions provided in Title I and Title VI of the same Act; and

SUPPLEMENTAL STATEMENT OF THE CASE

These respondents agree with and adopt petitioner's Statement of the Case and supplement same briefly. These respondents were members, and respondents Bryan, Comer and Greene were officers or representatives, of Local 7326, United Steelworkers of America, AFL-CIO-CLC. That Local engaged in a lawful strike at American Buildings Company (the Company) at Eufaula, Alabama, from December 3, 1976 to July 14, 1978.

This civil action under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401, *et seq.* (LMRDA), was brought against these respondents on May 1, 1980, in the United States District Court for the Middle District of Alabama. Respondents Erkins and Denson, as plaintiffs in the district court were on notice of their alleged claims against respondents Bryan, Comer, Bullard and Greene more than a year and one-half before they filed their suit.

Also, these respondents were indicted on November 3, 1981, in Docket No. 81-83-N, in that same district court for alleged criminal violations of the Act.

The criminal indictment was based upon substantially the same unfounded and unsupportable allegations of misuse of strike funds as appear in this civil suit. One count also included an allegation of the filing of a false Labor Organization Annual Report Form LM-2.

The indictment charged in summary:

> *Count I—Billy Ray Bryan*—as an officer, embezzlement and conversion of funds of the Local;

---

whether the court of appeals correctly interpreted *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983), in failing to apply that case's principles of limitation to this suit under § 501(b) of LMRDA.

Respondents suggest that the petition for certiorari in No. 85-2077 and the petition for certiorari here appropriately should be joined.

Count II—Billy Ray Bryan—as an officer, filing a false Labor Organization Annual Report Form LM-2;

Count III—Arthur Comer—as an officer, embezzlement and conversion of funds of the Local;

Count IV—Charlie Greene—as an officer, embezzlement and conversion of funds of the Local;

Count V—George D. Bullard—as an employee of the Local, embezzlement and conversion of funds of the Local.

At trial of the criminal cases to a jury, the Court dismissed Counts II and V of the indictment after hearing the evidence. The jury returned verdicts of not guilty on all remaining counts.

The decision below was incorrect, as Petitioner has set forth. These respondents are the innocent victims of that error.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JEROME A. COOPER
Counsel of Record
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

Attorneys for Respondents, Billy Bryan, Arthur Comer, George Bullard and Charlie Greene

Supreme Court, U.S.
FILED
OCT 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-2077 and 86-372

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BILLY BRYAN, ARTHUR COMER,
GEORGE BULLARD and CHARLIE GREENE,
(No. 85-2077)

and

UNITED STEELWORKERS OF AMERICA,
(No. 86-372)

Petitioners,

vs.

ELBERT ERKINS, SAMUEL DENSON,
and U.S. FIDELITY & GUARANTY CORP.,

Respondents.

On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENTS ELBERT ERKINS AND SAMUEL DENSON IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

Counsel of Record: WALTER F. KELLY
Sutton & Kelly
1409 East Capitol Drive
Milwaukee, WI 53211
(414) 961-0802

THOMAS M. JACOBSON
Jacobson, Sodos & Krings, S.C.
152 West Wisconsin Avenue
Milwaukee, WI 53203

WILLIAM I. GRUBB II
P. O. Box 357
Eufaula, AL 36027

55pp

QUESTIONS PRESENTED

1. Whether certiorari, having once already been denied, should now be granted on the issue of LMRDA §501 union membership enforcement, in view of the factual nature of the issue and the absence of any conflict among the Courts of Appeals on the issue?

2. Whether certiorari should be granted to reconsider the unanimous decisions of the lower federal courts that the timeliness of §501(b) fiduciary accounting proceedings is determined in equity by principles of laches and on the basis of those principles this equitable accounting action was timely?

3. Whether certiorari should be granted to consider the unbroken line of authority, indicating the absence of any conflict among the Courts of Appeals, and extending over twenty years and thirty federal judges, that §501(b) allows common-benefit attorneys' fee awards and authorizes fee awards to exceed the amount of the funds recovered in §501(b) equitable accounting proceedings?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES 4

INTRODUCTION 8

OPINIONS BELOW 8

JURISDICTION 9

STATUTES INVOLVED 9

STATEMENT OF THE CASE 10

The Fair Representation Suit . . . 10

Union Membership 11

Timeliness 15

Attorneys' Fees 20

Steelworkers' Status 28

REASONS FOR NOT GRANTING THE WRIT . . . 34

I. The Membership Issue 34

II. The Timeliness Issue 41

III. The Attorneys' Fees Issue . . 43

CONCLUSION 52

TABLE OF AUTHORITIES

Cases Cited

Alvey vs. General Electric Company, 622 F.2d 1279 (7th Cir. 1980) 39

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 48

Axelrod v. Stoltz, 264 F. Supp. 536 (E.D. Pa. 1967) 39

Bakery and Confectionary Workers v. Ratner, 335 F.2d 691 (D.C. Cir. 1964) 49,51

Basilicato v. International Alliance, 479 F. Supp. 1232 (D. Conn. 1979) . . . 39

Brink v. DaLesio, 453 F. Supp. 272 (D. Md. 1978) 48

Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 41,43

Donovan v. CSEA Local Union 1000, 784 F.2d 98 (2nd Cir.), cert. denied, ____ U.S. ____, 55 U.S.L.W. 3219 (1986) 49

Erkins v. Bryan, 663 F.2d 1048 (11th Cir. 1981), cert. denied, 459 U.S. 989 (1982) 8,11,34

Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984), aff'd, 785 F.2d 1538 (11th Cir. 1986) 25,43,51

Erkins v. Bryan, 785 F.2d 1538 (11th Cir. 1986) . . . 34,41-44,50,51

Erkins v. United Steelworkers of America, 723 F.2d 837 (11th Cir.), cert. denied, 467 U.S. 1243 (1984) . . . 10

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 43,46,48,49

Hall v. Cole, 412 U.S. 1 (1973) 44,46,48

Highway Truck Drivers Local 107 v. Cohen, 220 F.Supp. 735 (E.D. Pa. 1963) 49,51

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 42

Hughes v. Local Eleven International Association of Bridge Workers, 287 F.2d 810 (3rd Cir. 1960) 39

Johnson v. Georgia Highway Express, 488 F.2d 714 (5thCir. 1974) 23,24

Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963) 51

Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972) 51

Local 92, International Association of Bridge Workers v. Norris, 383 F.2d 735 (5th Cir. 1967) 42,50

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 48,49

Milone v. English, 306 F.2d 814 (D.C. Cir. 1962) 51

Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984) 51

Morrissey v. Curran, 483 F.2d 480 (2nd Cir. 1973) 51

Morrissey v. Curran, 482 F. Supp. 31 (S.D. N.Y. 1979) 41

Moschetta v. Cross, 241 F. Supp. 347 (D. D.C. 1964), on remand from 335 F.2d 691 51

Philadelphia Div. v. Pennsylvania Tel. Guild, 573 F. Supp. 314 (E.D. Pa. 1983) 51

Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968) 48

Ratner v. Bakery and Confectionary Workers, 354 F.2d 504 (D.C. Cir. 1965) 51

Retail Clerks Local 648 v. Retail Clerks Int. Ass'n, 299 F. Supp. 1012 (D. D.C. 1969) 51

Shimman v. Local 18, International Union of Operating Engineers, 744 F.2d 1226 (6th Cir. 1984) 43,50

Taylor v. Great Lakes Seaman's Union, Local 5000, 701 F.2d 590 (6th Cir. 1983) 39

Usery v. Local 639, I.B.T., 543 F.2d 369 (D.C. Cir. 1976) 49,51

Yoblonski v. U.M.W., 80 L.R.R.M. (BNA) 2594 (D. D.C. 1971) 41

Statutes Cited

29 U.S.C. 411(a)(1) 40

29 U.S.C. 501 18

29 U.S.C. 501(b) . . . . . 1 et seq.

Other Authorities Cited

1 Leg. Hist. of LMRDA of 1959 (NLRB 1959) 45

Comment: Counsel Fees For Union Officers Under The Fiduciary Provision Of Landrum-Griffin, 73 Yale L. J. 443 (1964) 51

Elliott Bill, H.R. 8342, 86th Cong. 1st Sess., 1959 44,45

Griffin Bill, H.R. 8400 45

Kennedy-Ervin Bill, s.1555, §109(b) . . 45

Securities Exchange Act of 1934, §14(a) 49

INTRODUCTION

The respondents, Elbert Erkins and Samuel Denson, request that this Court deny the petitions for writs of certiorari to review the decision of the Court of Appeals for the Eleventh Circuit entered on April 8, 1986 because that decision does not conflict with any decision of this Court or of any federal Court of Appeals, and there are no other special and important reasons for granting the writs.

OPINIONS BELOW

Respondents accept petitioners' statements of the opinions below with the single notable exception of the trial court's opinion, upon remand from 663 F.2d 1048 (11th Cir. 1981), cert. denied, 459 U.S. 989 (1982), on the merits of the §501

accounting, which is reprinted at R. App. A-1.

JURISDICTION

Respondents agree with the statements of jurisdictional grounds set forth in the petitions for writs of certiorari.

STATUTES INVOLVED

Respondents agree with the petitioners' identification of the statutes involved.

STATEMENT OF THE CASE

The petitioners in both petitions fail to state the facts fully and accurately. Therefore, plaintiffs-respondents supplement and correct those statements as follows.

The Fair Representation Suit

Petitioners in No. 85-2077 state that a suit (denominated by them as "Erkins II") initiated by plaintiffs-respondents herein and dismissed for untimeliness was "a second suit in equity ..." (Pet. 6) That is incorrect; the suit was a class action on behalf of all the union members who lost their jobs against the union for damages for breach of the duty of fair representation. Erkins v. United Steelworkers of America, 723 F.2d 837 (11th Cir.), cert. denied, 467 U.S. 1243 (1984). The individual petitioners sought unsuccessfully in both

the trial and appellate courts below to argue that the fair representation limitations' principle should control the §501 timeliness issues.

Union Membership

Petitioners in both No. 85-2077 and No. 86-372 incorporate only select facts on the issue of membership standing to enforce §501. (No. 85-2077 Pet. 5-7; No. 86-372 Pet. 3, 5, 9-10) The facts of membership were set forth in the original decision of the Court of Appeals in Erkins v. Bryan, 663 F.2d 1048 (11th Cir. 1981), cert. denied, 459 U.S. 989 (1982), were stipulated in the trial court upon remand and trial of the merits, and formed the basis for the instant decision of the Court of Appeals, for which review is sought, that "findings of fact ... [affirmed] by an appellate court

bind all subsequent proceedings on the same case ...." (No. 86-372, App. 4a)

Respecting the issue of the membership status of Erkins and Denson at the time of the commencement of the action, in addition to the facts set forth in the original opinion of the Court of Appeals, the following undisputed facts should be noted. Erkins and Denson were members in good standing of both the Steelworkers and the local throughout the duration of the strike between December, 1976 and July, 1978. Decertification of a local union as bargaining representative has no effect at all upon the continued existence of the local union; it means only that certified bargaining representative status from the NLRB is lost. When the union was decertified the Steelworkers put the local under the control of an administrator for purposes of "winding up" its affairs, presumably because it was a single-

bargaining unit local union. The local union, however, has never finally been wound up, and its existence and chartering are still in effect. Neither Erkins nor Denson has ever voluntarily withdrawn from nor been suspended nor expelled from the union's membership. Each remains fully within the Steelworker's constitutional definition of eligibility for membership. There has been no termination of the union either pursuant to the procedures established under the Landrum-Griffin Act with the United States Department of Labor or pursuant to internal union procedures within the Steelworkers. Indeed, the local union treasury last reflected a continuing balance of approximately $2,000, and the bank accounts from which the misappropriations occurred continued. While it is true that Erkins and Denson have not paid union dues since October, 1978, that fact alone is misleading, because Erkins and Denson have

not been obligated to pay dues, by virtue of the application of the out-of-work waiver of dues provisions of the Steelworkers' constitution. Moreover, Erkins and Denson as employees retain recall rights with the employer, as well as transfer rights within the union. Thus, should they be recalled, or should they obtain employment with another employer that recognizes a local union affiliated with the Steelworkers, then their active dues obligation would immediately, without more, recur. It is on the basis of all these facts, together with the facts stated in its opinion, that the Eleventh Circuit Court of Appeals concluded originally that Erkins and Denson made a sufficient showing of local union membership at the time of the initiation of the §501(b) suit to warrant the issuance of leave to proceed.

Timeliness

Petitioners in No. 85-2077 distort both the record facts and the trial court's analysis of those facts in their treatment of the issue of plaintiffs-respondents' timeliness in commencing this §501 action. The trial court analyzed the facts concerning timeliness (R. App. A-20-36), and the appellate court accepted that analysis. (No. 86-372 App. 8a) Some further exposition of those facts is necessary.

The initial concern of the union membership in June, 1979 was the loss of the strike. At a meeting on June 10, 1979 Steelworkers International representative, Caldwell, told plaintiffs, Erkins and Denson, that the union lawyers had not advised the strike leaders correctly regarding the right of the members to vote in the union decertification election. Caldwell also told Erkins and Denson that

the union lawyers had filed charges with the NLRB against the company, but that these charges were dismissed. A cousin of plaintiff Erkins lived in Milwaukee and this is how Milwaukee attorney Thomas M. Jacobson became known to the plaintiffs. At a meeting in late June, 1979 Jacobson was informed of Caldwell's statements but stated he could not take the case until a retainer was paid to provide for costs and expenses. The plaintiffs returned to Jacobson's office on October 30, 1979 with the money to retain his services. Jacobson researched the law and in November, 1979 corresponded with the Steelworkers regarding internal procedures available to the membership to obtain answers for their concerns as to why the strike was lost. The Steelworkers' response was unsatisfactory.

On November 30, 1979 Jacobson went to Eufaula, Alabama, and a meeting was held at a Baptist church in Eufaula where the

plaintiffs as well as other union members discussed the concerns of those present as to why the strike was lost. Denson thought the company and the union leaders were all in on it together; he was suspicious that the company bought the union leaders off--paid them off. It was at this meeting that Erkins and Jacobson received information from union member, J. L. Pittman, which in turn resulted in an early morning meeting on December 1, 1979 with Sandra and Walter Ward. Sandra Ward showed cancelled checks for the period April-May, 1978 to Jacobson. The Wards had not previously shared the cancelled checks with anyone from the union membership. It was not until the early-morning meeting with the Wards on December 1, 1979 that the strike leaders, individual petitioners herein, clearly surfaced as the target for concern over why the strike was lost.

After this information was received, Jacobson again contacted Steelworkers in December, 1979 and, receiving no response, yet again in Janaury, 1980. His correspondence specifically requested the Steelworkers, pursuant to 29 U.S.C. §501, to file suit against the strike leaders, individual petitioners here, for violating their fiduciary responsibilities to the membership during the strike. On January 16, 1980 the Steelworkers' response was received, refusing the demand to file suit. Thereafter, Jacobson obtained in hand an affidavit from Sandra Ward containing the cancelled check expenditures for the period April-May, 1978. This information was furnished to the Steelworkers on February 11, 1980. The membership renewed its request that Steelworkers commence suit for an accounting pursuant to §501.

A Steelworkers' response on February 15, 1980 was indicative of some willingness to pursue the union members' request and therefore additional contact was made. Jacobson told the Steelworkers about personal property of substantial value which the strike leaders had accumulated at the end of and shortly after the strike. On March 6, 1980 Steelworkers changed its position and refused to file suit or otherwise pursue the plaintiff union members' request and, instead, turned over Local 7326's strike records to the U.S. Department of Labor.

Between March 6, 1980 and May 1, 1980 plaintiffs' attorney searched for and retained local counsel and drafted pleadings. A federal judge had to be found to obtain permission for the filing of the §501 lawsuit; Judge Varner was ill during this period of time; Judge Johnson had recently been elevated to the Eleventh

Cirucit Court of Appeals. Shortly after Judge Truman Hobbs was confirmed, Jacobson and the plaintiffs went to Montgomery, Alabama, and received the trial court's permission to file the suit on May 1, 1980. Thus, even if a six-month limitations' period was applied to this case, the action was timely commenced.

Attorneys' Fees

Petitioners in both No. 85-2077 and No. 86-372 incorporate limited and incomplete facts respecting plaintiffs-respondents' entitlement to attorneys' fees. (No. 85-2077 Pet. 14 & n. 11; No. 86-372 Pet. 7-8) A brief examinaton of the record reveals the enormous amout of fact development and legal research that went into plaintiffs-respondents' effort to enforce what was

regarded by Congress as the key fiduciary provision of LMRDA.[1]

For this quantity of representation, plaintiffs' counsel claimed 1,649 hours, all supported by contemporaneous time records, none of which was duplicative. All time spent by plaintiff's counsel on the parallel criminal and fair representation litigation was excluded from this computation. In

---

[1] The docket entry sheets in this case themselves run to a dozen pages and reveal complete legal research on the legislative history of §501 and its interpretation respecting "membership," standing, conditions precedent, notice and claim, showing of "good cause," fiduciary violations, the remedy of accounting, intervention, indemnification, timeliness, costs, interest, fees, parallel criminal litigation, disqualification, and analogies to shareholder derivative litigation; investigation and examination of approximately 6500 documents; nearly a dozen depositions; the presentation of fourteen witnesses at the accounting hearing; dozens of motions and briefs; three full-dress appeals; briefing on an earlier petition for certiorari; travel and communications from far-away distances; and an incalculable host of meetings, telephone calls, memos, smaller research projects, correspondence, and affidavits.

short, on the record, the quantification of plaintiffs' counsel's time was conservative and limited to the essence of their representation.[2]

Plaintiffs-respondents' counsel valued their time at $125.00 per hour for Mr. Jacobson and Mr. Kelly and $80.00 per hour for Mr. Grubb. Mr. Jacobson valued his travel time at 20% of his average hourly fee. These hourly rates were well within the prevailing market rate for this kind of representation in the Alabama federal courts

---

[2] The record on quantification consisted of the original affidavits of Thomas M. Jacobson (R. 704-729), Walter F. Kelly (R. 730-738), and William I. Grubb, II (R. 691-695), with attached contemporaneous time records, the master affidavit of Walter F. Kelly (R. 697-703), the reply affidavit of Thomas M.Jacobson (R. 826-829), and the reply affidavit of Walter F. Kelly (R. 817-819). These documents evidenced, <u>without rebuttal</u>, that plaintiffs' counsel allocated work to avoid duplication, maintained contemporaneous time records, accumulated assignments to save time, excluded time spent on the parallel fair representation litigatin, and were required to deal with difficult obstacles erected by defense counsel and Steelworkers' counsel.

in this kind of litigation, as attested by two highly respected Alabama attorneys with federal trial practices and 58 years of Alabama trial experience between them.[3]

Plaintiffs-respondents' counsel all have considerable trial experience and high reputations for professional excellence, including various awards and professional recognition, as well as formidable results obtained in a wide variety of litigation. All the Johnson factors were met by plaintiffs-respondents' counsel;[4] indeed,

---

[3] The record on hourly rates and prevailing market rates consisted of the original affidavits of Thomas M. Jacobson (R. 704-729), Walter F. Kelly (R. 730-738), William I. Grubb, II (R. 691-695), Jack E. Held (R. 820-823), and Maury D. Smith (R. 823-826).

[4] Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). The record on the satisfaction of the Johnson factors consisted of the original affidavits of Thomas M. Jacobson (R. 704-729), Walter F. Kelly (R. 730-738), William I. Grubb, II (R. 691-695), the master affidavit of Walter F. Kelly (R. 700-702), the fee petition (R. 697-698), the fee petition brief (R. 739-752), and reply brief (R. 802-816).

not a single Johnson factor disfavored fee compensation, while nearly all such factors affirmatively favored fee compensation.

The plaintiffs-respondents retained Mr. Jacobson's firm on the basis of an initial $10,000 flat fee agreement with an ongoing hourly fee thereafter. This fee agreement was thereafter modified to reflect the facts that all initial retainer fees were devoted to costs and expenses, and that counsel could receive as fees only whatever could be obtained by recovery under §501, LMRDA. The fee requested in the case thus conformed to the fee agreement. In fact, the entire retainer fee was utilized for costs and expenses, and Mr. Jacobson's firm advanced an additional $3,000 for further costs and expenses.

On the basis of this substantial and uncontradicted factual record, plaintiffs-respondents' counsel computed 1,428.50 hours at $125.00 per hour, plus 93 (travel) hours

at $25.00 per hour, plus 127.50 (local counsel) hours at $80.00 per hour, for a "lodestar" of $203,587.50 for 1,649 total hours, at an average hourly rate of $123.40, a rate well within the prevailing market range in the Alabama federal trial courts for litigation of this complexity.

The trial court awarded a fee of $42,000, prejudgment interest at the legal rate from July 14, 1978, and costs of $3,123.99. Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984). Without substantiation, and based upon conjecture unsupported by the record, the trial court reduced plaintiffs' counsels' hours to "hundreds of hours," or by inference from the trial court's "lodestar-only" estimation to between 950 and 1000 hours, or to "a thousand or more productive hours." Also, in the face of uncontradicted affidavits respecting the market reasonableness of

counsels' hourly rates, the trial court set the lodestar hourly rate at $90.00 per hour.

Even though the trial court determined, on the basis of the fee petition and supporting materials "more than adequate to serve as a basis for an informed decision," that "in order to secure this judgment against defendants, plaintiffs had to overcome difficult legal and factual obstacles that arose during the course of this protracted litigation," that "... plaintiffs conferred some benefit upon the union which is in excess of their monetary judgments," that "plaintiffs were represented by able, dedicated attorneys," who "demonstrated skill and tenacity in persevering in the representation of their clients, despite many obstacles," that based upon the lodestar, "the fee should be no less than $95,000.00 to $100,000.00," that "the case presented a novel question on the issue of standing that was resolved in favor

of plaintiffs on appeal," that "plaintiffs' proof depended on the difficult chore of assembling and reviewing numerous checks in an effort to make sense out of the local's chaotic financial records," that plaintiffs' "representation should invoke consideration similar to a contingent fee case," that "the Court will treat all claims as related," and "[n]one of plaintiffs' fees will be disallowed for unsuccessfully pursuing an unrelated claim," and that "the length of time from the filing of the suit to its conclusion and the travel involved for all of plaintiffs' attorneys" made the case "undesireable," nevertheless "... the Court has reduced the amount that plaintiffs may require the union and/or the defendants to pay for plaintiffs' attorneys based on the results obtained and the amount in controversy." In fact, of course, the trial court cut counsels' hours by nearly 40% and counsels' hourly market rates by 25%,

eliminated any contingency factor in a case that required one, and then reduced that already depleted base fee by another 60%, thus lowering plaintiffs' counsels' petitioned fee by 85% to an award that computes at $26.25 per hour.

Steelworkers' Status

Petitioner in No. 86-372 asserts that it is "not a party to the lawsuit," its "limited intervention was exhausted with the resolution of the 'member' issue," it was "not a party to the litigation on the merits," that it "did not participate at the trial," and that upon the filing of plaintiffs-respondents' fee petition it "intervened once again, this time to resist the fee award ...," and to renew "its contention that plaintiffs were not 'members' entitled to prosecute this §501(b) action." (No. 86-372 Pet. 4,6 & n. 5) At

the outset of its argument for granting the writ on the attorneys' fees issues, it again remarks that it was "not a party to this litigation." (No. 86-372 Pet. 15)

In its original Reply Brief in Support of Certiorari in this Court, Steelworkers asserted at pp. 1-3 its party status, informing this Court that the trial court had permitted it to intervene, and that in the Court of Appeals, "USWA filed a brief as a party and presented oral argument as a party." [Emphasis suppled.] At pp. 7-8 of its June 6, 1984 decision on the merits (R. App. A-11-12), the trial court stated "[o]n June 12, 1980 the International filed a motion to intervene in this lawsuit for the special purpose of seeking a vacation of this court's order allowing plaintiffs to commence this action. The court allowed the International to intervene." Thereafter, having disclaimed party status during the §501 accounting hearing on the merits,

precisely because it wanted to avoid liability for fees and costs,[5] Steelworkers again reversed itself (Steelworkers' Brief in the Court of Appeals at pp. 1 & n. 1, 17 n. 13) because it wanted party status in order once again to petition this Court on the "membership" issue, in the event it was unsuccessful in the Court of Appeals. Whatever Steelworkers tactical motive, its behavior reflects that "[i]t has also been the moving force behind most of the work in defense of this suit."

Steelworkers' unresponsiveness to the individual petitioners' misappropriations, both before and during the §501 proceedings, has been readily apparent throughout this case. Rather than sue for an accounting,

---

[5] Steelworkers' recurring point in opposition to a fee award against it in the trial court was that it was not a party to this action. (Steelworkers' Brief in Trial Court at pp. 2-4 & n. 2, 5, 6-9, & 22-25) That argument was abandoned in its Brief in the Court of Appeals.

Steelworkers obstructed and delayed the §501 suit in every conceivable fashion, while the individual petitioners' attorneys successfully defended them against a limited criminal indictment covering only a few thousand dollars of the total misappropriation of strike money. None of the $40,000-plus trip money was part of the indictment. Further, the checks taken for purposes such as house payments, car payments, and medical bills, which were pocketed personally by the strike leaders,were not part of the indictment.

The record reveals just how resistant Steelworkers was to effective investigation and revelation of the individual petitioners' wrongdoing. Close examination of portions of a Steelworkers' affidavit reveals a complete avoidance of vigorous union investigation. Specifically, the Steelworkers' Streigel did not proceed directly to work auditing the local. The

Steelworkers' Frankel and Streigel took two to three weeks to schedule a conference with their auditor. A check on expenditures was delayed until after receipt of the Ward affidavit. Further evidence of possible fiduciary violations was resisted, and its provider's motives were attacked. The Steelworkers' Frankel committed himself to inform plaintiffs-respondents' counsel of preliminary audit findings, yet this was never done, and the proposed audit was falsely characterized as "in progress." The Steelworkers' Streigel and Steinbaugh did not act at all until a full month after the Ward affidavit's receipt, and no explanation has ever been offered for their failure to act or for why the use of a private accounting firm excluded an immediate audit check. Upon filing of the Steelworkers' Streigel affidavit in August, 1984 it was revealed that ordinary audit between 1978

and 1980 of the Local had been backlogged for months.

Nor was Steelworkers cooperative in obtaining the relevant union records for plaintiffs-respondents. Those records were obtained by subpoena and inspection in the parallel fair representation action of U.S. Department of Labor records in Atlanta on August 11-12, 1981. An affidavit of the inspection and its results was filed thereafter in this case, and it became one of the bases for plaintiffs-respondents' successful motion to amend their complaint, upon return of this case to the trial court, to cover all strike-fund payments.

Finally, Steelworkers alleged non-participation upon return of the case to the trial court is disingenuous; it never produced the documents set forth in its Streigel affidavit until after the §501 merits hearing, even though those documents had been subpoenaed; it never offered to

produce Streigel for deposition prior to trial; it provided documents and its outside accountant Mr. Prystash, only upon plaintiffs-respondents' counsel's repeated insistence; and individual petitioners' witness, Steelworkers District Director Strevel did everything he could to excuse, justify, and exonerate the individual petitioners' §501 violations at the hearing on the merits.

REASONS FOR NOT GRANTING THE WRIT

I. The Membership Issue

The same arguments respecting membership in the union were presented to this Court upon petition to review Erkins v. Bryan, 663 F.2d 1048 (11th Cir. 1981), and that petition was denied. 459 U.S. 989 (1982). Petitioners state that the matter was then interlocutory, but the facts were

finally found, stipulated upon remand in the trial court, and reaffirmed by the appellate court in this case. Erkins v. Bryan, 785 F.2d 1538, 1542 (11th Cir. 1986). Thus the case comes to this Court in no different posture than it did in 1982.

Steelworkers opine that the definition of membership applied in this case substantially burdens all unions as well as the case load of the federal courts. Neither proposition is true. The constitutional definitions of eligibility for membership and limitations upon membership in various unions affiliated with the AFL-CIO are as varied as are the politics and identities of the unions so affiliated. The interplay between the statutory definition of membership under the Landrum-Griffin Act and the constitutional membership provisions of various unions will always differ from case to case depending upon the facts of each case, the

constitutional provisions involved, the substantive Landrum-Griffin rights being asserted, and the membership provisions of the Act. It is to construct a strawman for the Steelworkers to contend that the highly factual construction of "membership" in the instant case constitutes a per se rule respecting all membership in all unions for all purposes. Moreover, in order to construct the strawman, Steelworkers have assumed that full statutory "due process" provisions must be applied in order administratively, as an intra-union matter, to accomplish a suspension or termination of membership for non-disciplinary reasons such as final termination of local union existence and bargaining status. No case so holds. For these reasons, Steelworkers' contentions respecting the practical impact of the decision below upon the administration of labor unions are illusory.

The Steelworkers also contend that the "membership" determination below will greatly burden the federal district courts in their statutory obligations respecting the fiduciary duties of union officials. However, the balance struck by Congress respecting the tension between union members' access to the federal courts and union officials' duties to be honest is a balance that under §501(b) vests substantial discretion in federal district court judges as to whether or not the grant leave to proceed. Indeed, the door to federal court is more closely guarded by §501(b) than it is in any other kind of federal district court civil litigation. Thus, there is no undue burden upon the federal courts by virtue of the decisions of either the Eleventh Circuit or the trial court.

Steelworkers' and the individuals' petitions argue for a certain construction of the membership definitional provisions of

the Landrum-Griffin Act, so that fulfillment of the requirements for membership in a labor organization is a functional category based on intra-union constitutional membership status at the time of commencement of the litigation. On the basis of the actual facts of record in this case, whether any court prefers the Steelworkers' construction of the Act is irrelevant, because Erkins and Denson satisfied even the Steelworkers' requirements for membership. To phrase it differently, the Court of Appeals originally did not premise its decision on a purely temporal reading of the statute but rather upon all the factual variables demonstrating membership on this record. Indeed, the reason that this case is actually a mine-run case respecting the statutory meaning of "membership" is because virtually every federal court that has considered "membership" has followed the approach of

examining all factual and union constitutional variables respecting membership and then deciding each case on its own particular facts. See, e.g., Alvey v. General Electric Company, 622 F.2d 1279 (7th Cir. 1980); Hughes v. Local Eleven International Association of Bridge Workers, 287 F.2d 810 (3rd Cir. 1960); Basilicato v. International Alliance, 479 F. Supp. 1232 (D. Conn. 1979); Axelrod v. Stoltz, 264 F. Supp. 536 (E.D. Pa. 1967).

Steelworkers' and the individuals' petitions seek to present a supposed conflict between the foregoing decisions and the Sixth Circuit's decision in Taylor v. Great Lakes Seaman's Union, Local 5000, 701 F.2d 590 (6th Cir. 1983). However, as Taylor recognizes, 701 F.2d at 592, and as petitioners seek to minimize or ignore, "Brennan and Alvey involved former union members whose employment within their unions' jurisdiction had been terminated

involuntarily through ... replacement of striking workers ...," and "Steelworkers' membership policy presently in dispute would not apply to persons whose positions were similar to those occupied by the Brennan and Alvey plaintiffs." Characterizing this distinction as "crucial," the Sixth Circuit also continues on to remark the nature of that case as one under §101(a)(1) of LMRDA and to note the reasonableness of the union's rule on the issue of membership for voting purposes under LMRDA. Of course, the issue in the instant case concerns reasonableness of the definition of membership with respect to §501(b) enforcement in a local union dormancy setting, an issue as to which there is absolutely no conflict amongst the Courts of Appeals.

II. The Timeliness Issue

Individual petitioners in No. 85-2077 argue that this Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), should be applied to §501(b) equitable accounting actions. Petitioners can point to no decisions of this Court or of any Court of Appeals conflicting with the trial court's and the Court of Appeals' decision that "[t]he cause of action under consideration here is quite different from those described and we conclude that the limitation period for filing a §501 action is not governed by Del Costello, Erkins II, or Davis. Erkins v. Bryan, 785 F.2d 1538, 1543 (11th Cir. 1986). The case law is unanimous that §501(b) equitable accounting proceedings are governed by laches as 'an appropriate test for timeliness[,]' Morrissey v. Curran, 482 F. Supp. 31, 40 (S.D. N.Y. 1979), Yoblonski

v. U.M.W., 80 L.R.R.M. (BNA) 2594 (D. D.C. 1971), [s]ince a §501 suit for an accounting is essentially equitable in nature ...." Erkins v. Bryan, 785 F.2d 1538, 1543 (11th Cir. 1986), citing, Local 92, International Association of Bridge Workers v. Norris, 383 F.2d 735, 741 (5th Cir. 1967). That law in turn is consistent with this Court's decision in Holmberg v. Armbrecht, 327 U.S. 392 (1946), as the Erkins Court recognized. Id.

There is yet a further reason to deny the petitioned writ on the timeliness question, and that is because, as respondents have described in their Statement of the Case, the trial court determined and the Court of Appeals accepted that this action was commenced May 1, 1980, less than six months after plaintiffs-respondents' discovery on December 1, 1979 of the cancelled checks of April and May, 1978, which provided the factual basis for

pursuit of their §501(b) case. Thus, even if Del Costello and its progeny applied to §501(b) equitable accounting proceedings, there would be no basis for reversal.

III. The Attorneys' Fees Issue

Both the individual petitioners in No. 85-2077 and the Steelworkers petitioner in No. 86-372 assail decisions of the trial court, Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984), and the Court of Appeals, Erkins v. Bryan, 785 F.2d 1538, 1544-49 (11th Cir. 1986), that they "pay $42,000.00 for plaintiffs' attorneys' fees." Petitioners claim that the fee award decisions conflict with the plain language of §501(b), its legislative history, this Court's decision in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), and the Sixth Circuit's decision in Shimman v. Local 18, International Union of

Operating Engineers, 744 F.2d 1226, 1235 n. 13 (6th Cir. 1984). On all points, the petitioners are in error.

The "plain language" argument has repeatedly been rejected by this Court in the context of LMRDA because, as the Court of Appeals noted, 785 F.2d at 1547, "LMRDA reflects 'calculated ambiguity [and] political compromise' rather than a precise congressional directive." See, Hall v. Cole, 412 U.S. 1 (1973).

The legislative history argument fails because "we can never be sure, in the absence of an explicit statement, why Congress fails to act[,]" and because it, too, was the product of "calculated ambiguity [and] political compromise." For example, Steelworkers' recitation of the legislataive history fails to consider inter alia the important developments that occurred in the House Labor Committee in reporting the Elliott bill, H.R. 8342, 86th

Cong., 1st Sess. (1959) to the House, when key sponsors of the legislation, speaking of the fee recovery enforcement remedial provisions of §501 of that bill, a bill identical in that respect to the Landrum-Griffin bill, H.R. 8400, and substantially similar in that respect to original §109(b) of the Kennedy-Ervin bill, s.1555, stated in their Supplemental Views:

> The bill also authorizes a union member to bring an action against any official or agent who violates his fiduciary obligations, if the union refuses to sue -- and again such member may recover counsel fees and costs if he prevails. [Emphasis added.]

H. Rep. No. 741 on H.R. 8342 (July 30, 1959), 1 Leg. Hist. of LMRDA of 1959 at p. 840 (NLRB 1959). Those Supplemental Views are extremely important because they were expressed by key supporters of the "realist" labor position in the House, Reps. Carl Elliott, Edith Green, Frank Thompson,Jr., Stewart L. Udall, and James G. O'Hara, and thus they likely carried to the

floor and the conference this understanding of §501. This sequence of events is not unlike that analyzed by the Supreme Court in Hall, 412 U.S. at pp. 11-14 & nn. 17-19, and strongly suggests that key sponsors and supporters of the Elliott legislation believed that the identical provisions of the Landrum-Griffin legislation "allowed the union member to recover counsel fees." Hall, 412 U.S. at p. 12 n. 19.

The supposed conflict between this Court's decision in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), and the decision below was repudiated by the Court of Appeals, 785 F.2d at 1546-47, because "[t]he remedies provided under §501 of the LMRDA do not approach the specificity of those considered in Fleischmann, an action for trademark infringement under the Lanham Act ...," and §501 "hardly sets forth the comprehensive remedies found in the Lanham Act." Moreover, other decisions of this Court illuminate the limited bearing of Fleischmann upon §501 fees. Not the least of the reasons for declining to grant Steelworkers' petition is the decision of this Court in Hall v. Cole, 412 U.S. 1 (1973). In Hall the Court held that a

prevailing LMRDA Title I "Bill of Rights" claimant could recover a full award of attorneys' fees for his "free speech," non-monetary victory, notwithstanding the absence of statutorily express language authorizing the award. The Court reasoned that the correction of "free speech" abuse by the particular intra-union political claimant was a correction benefitting the entire union membership and remarked in particular the important LMRDA purpose of exposing fiduciary abuse by union officials. Hall, 412 U.S. at 6-7 & n. 7. The Court noted the analogy between the conferral of a common non-monetary benefit upon the union membership in Hall and the conferral of a common benefit in pre-Hall common benefit fee award cases, Hall, 412 U.S. at 6-7, 12-13, and the equity basis for such an award, Hall, 412 U.S. at 5, and emphasized the statutory enforcement purposes of private party LMRDA litigation. The Court further noted the express statutory authorization for such an award in §501 litigation, thereby confirming that provision's a fortiori alowance for fee awards. Hall, 412 U.S. at 11-12 & n. 17. Hall is particularly devastating to the Steelworkers' petition for two reasons: (1) it expressly

incorporates the non-monetary common benefit rationale developed in shareholder derivative suits and recognized by this Court in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), into LMRDA fee analysis, and §501(b), of course, was patterned after private enforcement in such derivative litigation, see, e.g., Phillips v. Osborne, 403 F.2d 826, 831-32 & n.8 (9th Cir. 1968), Brink v. DaLesio, 453 F. Supp. 272, 279-80 (D. Md. 1978); and (2), it expressly considered and rejected the applicability to LMRDA remedies of the rationale of Fleischmann that "meticulously detailed" remedies serve to limit otherwise generally available equitable fee-shifting powers of the federal courts, a rationale that serves as the linchpin of Steelworkers' analysis that the decision below conflicts with Fleischmann. Hall, 412 U.S. at 9-14. Because Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), was decided after Hall it is not specifically distinguished, but as the D.C. Circuit says, "Hall extends Mills to an express statutory [LMRDA] cause of action. This development remains undisturbed after Alyeska because the "common benefit" rationale was not involved in that case, and [this] Court made

clear that 'Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing attorneys fees.' With respect to LMRDA courts have uniformally applied a 'common benefit' analysis to award attorneys' fees to private litigants." Usery v. Local 639, I.B.T., 543 F.2d 369, 382 & n.31 (D.C. Cir. 1976).

The Fleischmann rationale was also rejected in Mills, a shareholder derivataive suit enforcing provisions of §14(a) of the Securities Exchange Act of 1934, and seeking an interim award of fees, by citation to the fee rationale of the then leading §501(b) decision, Bakery and Confectionary Workers v. Ratner, 335 F.2d 691, 696-97 (1964), for the proposition that "we [eight members of the Court] cannot fairly infer from the ... Act ... a purpose to circumscribe the courts' power to grant appropriate remedies." The same 8-1 Mills majority also cited the §501(b) fee award decision in Highway Truck Drivers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963), for the propositin that "petitioners [shareholders] ... [were] entitled to an interim award of litigation expenses and reasonable attorneys' fees." Mills, 396 U.S. at 389, 391, 393-97. See Donovan v. CSEA Local

Union 1000, 784 F.2d 98, 104 (2nd Cir.), cert. denied, _____ U.S. _____, 55 U.S.L.W. 3219 (1986).

Petitioners also argue that the decision below conflicts with Shimmon v. Local 18, International Union of Operating Engineers, 744 F.2d 1226, 1235 n. 13 (6th Cir. 1984). Shimmon, of course, is not a §501(b) suit, but rather a free speech and assault suit, and as the Court of Appeals noted, 785 F.2d at 1548-49, "Shimmon's primary benefit, in the sum of $225,000.00 ran solely to the named plaintiff .... Any incentive for change in union policy was largely ancillary to plaintiff's' personal recover. Here, in contrast, the monetary recovery, as well as the incentive to change, directly concerns USW rather than the plaintiffs."

Indeed, the twenty-year long line of authority construing §501(b)'s fee award provision is unbroken that the amount recovered does not limit the fee award available under the common benefit rationale. Not a single federal judge of the approximately thirty to have considered this question has agreed with Steelworkers' analysis. Local 92, International Association of Bridge Workers v. Norris, 383

F.2d 735 (5th Cir. 1967); Morrissey v. Curran, 483 F.2d 480 (2nd Cir. 1973); Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963); Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972); Milone v. English, 306 F.2d 814 (D.C. Cir. 1962); Bakery and Confectionary Workers v. Ratner, 335 F.2d 691 (D.C. Cir. 1964); Ratner v. Bakery and Confectionary Workers, 354 F.2d 504 (D.C. Cir. 1965), aff'g. Moschetta v. Cross, 241 F. Supp. 347 (D. D.C. 1964), on remand from 335 F.2d 691, supra; Usery v. Local 639, I.B.T., 543 F.2d 369 (D.C. Cir. 1976); Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984); Highway Truck Drivers & Helpers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963); Retail Clerks Local 648 v. Retail Clerks International Association, 299 F. Supp. 1012 (D. D.C. 1969); Philadelphia Div. v. Pennsylvania Tel. Guild, 573 F. Supp. 314 (E.D. Pa. 1983); and, of course, Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984), aff'd, 785 F.2d 1538, 1544-49 (11th Cir. 1986). As Judge Hobbs put it, "courts have consistently rejected the unions' contentions that counsel fees should be limited to the amount of the monetary recovery." See, generally, Comment: Counsel Fees For Union Officers Under The Fiduciary

Provision Of Landrum-Griffin, 73 Yale L. J. 443, 468-71 & nn. 119-130 (1964).

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari in No. 85-2077 and No. 86-372 should be denied.

Respectfully submitted,

Counsel of Record: WALTER F. KELLY
Sutton & Kelly
1409 East Capitol Drive
Milwaukee, WI. 53211

THOMAS M. JACOBSON
Jacobson, Sodos & Krings, S.C.
152 West Wisconsin Avenue
Milwaukee, WI 53203

WILLIAM I. GRUBB II
P. O. Box 357
Eufaula, AL 36027

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
OCT 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-2077 and 86-372

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BILLY BRYAN, ARTHUR COMER,
GEORGE BULLARD and CHARLIE GREENE,
(No. 85-2077)

and

UNITED STEELWORKERS OF AMERICA,
(No. 86-372)

Petitioners,

vs.

ELBERT ERKINS, SAMUEL DENSON,
and U.S. FIDELITY & GUARANTY CORP.,

Respondents.

On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX TO BRIEF OF RESPONDENTS ELBERT ERKINS AND SAMUEL DENSON IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

Counsel of Record: WALTER F. KELLY
Sutton & Kelly
1409 East Capitol Drive
Milwaukee, WI 53211
(414) 961-0802

THOMAS M. JACOBSON
Jacobson, Sodos & Krings, S.C.
152 West Wisconsin Avenue
Milwaukee, WI 53203

WILLIAM I. GRUBB II
P. O. Box 357
Eufaula, AL 36027

MEMORANDUM OPINION

OF JUDGE TRUMAN HOBBS

IN

ERKINS V. BRYAN
Case No. 80-180-N
Middle District of Alabama
June 6, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ELBERT ERKINS and
SAMUEL DENSON

Plaintiffs

v.

BILLY BRYAN, and ARTHUR
COMER, and GEORGE BULLARD
and CHARLIE GREENE, and
UNITED STATES FIDELITY
AND GUARANTY CORPORATION

Defendants

MEMORANDUM OPINION

This action was commenced under Section 501 (b) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501, by two members of Local 7326, United Steelworkers of America, against defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Greene. Plaintiffs allege that said defendants breached their fiduciary duties owed to Local 7326 by

misappropriating strike funds for their own personal benefit in violation of 29 U.S.C. § 501(a). This Court has jurisdiction by virtue of 28 U.S.C. § §§ 1331 and 1337. This matter was tried before the Court without a jury on January 3-5, 1984. The Court, having considered the evidence presented at trial, and the arguments of the parties as reflected in their post-trial briefs, now enters this memorandum opinion pursuant to Rule 52 of the Federal Rules of Civil Procedure. For the reasons stated herein, the Court finds for the plaintiffs.

BACKGROUND

Elbert Erkins and Samuel Denson, plaintiffs in the above styled action, were rank and file members of the United Steelworkers of America (International) and of its affiliate, Local 7326. Defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Greene were also members of the

United Steelworkers of American and Local 7326. During the relevant times herein, each defendant occupied at one time or another a position of fiduciary responsibility for Local 7326.[1/]

From December 1976 through May, 1978, approximately three hundred members of Local 7326 engaged in a strike against their employer, the American Buildings Company of Eufaula, Alabama. This strike commenced at the expiration of the agreement between Local 7326 and the company and was prompted by new terms to the collective bargaining agreement demanded by the company. In support of the strike, the AFL-CIO later declared a boycott of the company's products.

1. Defendant Bullard contends that he was never an officer, agent, shop steward, or representative of Local 7326 and, thus, under the language of Section 501, cannot be deemed a proper party defendant in this action. The Court will address this contention hereinafter.

The strike was long and bitter. Shortly after the strike began, the leaders of Local 7326 were instructed by the International to establish a strike committee. A meeting was convened, and the membership elected Oscar Boswell, Tommy Gilbert and Sammy Belcher to serve on this strike committee. The local's financial officers -- Billy Bryan (President), Walter Ward (Treasurer), and Billy Campbell (Financial Secretary) -- also served on this committee. In support of the strike, the International periodically sent money to the local with instructions that it be deposited into a special checking account which would contain only strike and defense funds. This was standard procedure when any local union engaged in a strike. The fund was financed from dues collected from union members throughout the country.

The strike and defense fund was created to assist strikers in providing for themselves and their families. Strikers originally received a weekly strike benefit of $20.00, but this amount was raised to $30.00 per week in September 1977. In order to qualify for this weekly benefit, a striker was required to perform work for the union, which usually meant working a shift at the picket line. In addition to this weekly benefit, a striker could petition the strike committee to obtain money from the strike fund to pay bills or other obligations. To obtain this additional assistance, the striker would have to demonstrate an urgent need. The strikers were instructed at the outset of the strike to exhaust their own financial resources and seek alternative sources of income (e.g., unemployment compensation) before petitioning the strike committee for

assistance. See Plaintiffs' Exhibit Nos. 7, 16. No employee was entitled to assistance from the strike fund except by demonstrating need. During the course of the strike, literally hundreds of the strikers' bills were paid from the strike funds. With few exceptions, no striker lost a house, automobile or other item of personal property for failure to meet his monthly payments.[2/]

When a striker received this additional assistance from the strike fund, he was required to perform additional work for the union as reimbursement for that assistance. Elbert Erkins testified that whenever he obtained additional money, he would have to

2. William Walker testified that his automobile and furniture were repossessed when the strike committee refused to advance him any more money from the strike fund. He conceded on cross-examination, however, that he was employed during the strike and was told by the strike committee that first preference would have to go to the unemployed strikers.

walk extra shifts on the picket line or forego receiving a commensurate number of weekly benefit checks. William Walker and Billy Bryan offered similar, corroborative testimony.

Toward the beginning of the strike, the picket lines were fully manned as most strikers were still unemployed and eager to lend their time and efforts in furtherance of the strike. As the months passed, however more and more strikers left to seek employment elsewhere This caused severe problems for the leaders as they often had to scurry around to find enough strikers to maintain the picket lines. Billy Bryan and George Bullard testified that they were asked by various members to abandon their employment or efforts in seeking employment and concentrate their full time and energies on maintaining the strike. Demands on the leaders' time

increased even further during the peak of the boycott as they spent much of their time on trips away from Eufaula seeking to enlist the support of other workers in behalf of the boycott. More than one of the defendants testified that his duties for the union required him to work from twelve to sixteen hours per day for five to seven days per week.

Despite vigorous efforts by the union, the strike was lost when the employees voted not to be represented by the union at a decertification election conducted on May 18, 1978. The results of this election became final when the union's objections to the decertification election were rejected by the NLRB on July 14, 1978.

After losing the decertification election, Local 7326 was no longer authorized to represent the employees at the company's Eufaula plant. Since Local 7326 did not serve

as the bargaining representative for employees of any other employer, William Caldwell, a representative of the International, was appointed as administrator to conclude the affairs of Local 7326. Following Mr. Caldwell's appointment, Local 7 ceased to exist for all practical purposes. All remaining strike finds were eventually returned to the International.

Shortly after the conclusion of the strike and the NLRB's certification of the election results, several members of the union, became concerned that defendants had personally benefited from the strike. Although they suspected that defendants had improperly used strike funds to purchase several items of personal property, plaintiffs had no tangible proof to support these suspicions. There was even some speculation that defendants may have received bribes from company officials. No evidence was presented in support of any such speculation.

Arrangements were made for Mr. Caldwell to meet with plaintiffs and other employees to discuss why the strike and election were lost and whether any of the defendants may

have misappropriated strike funds. Despite this meeting with Mr. Caldwell, plaintiffs' suspicions still existed, and they decided to conduct their own investigation. They traveled to Milwaukee, Wisconsin in June 1979 to secure the assistance of Thomas Jacobson, an attorney. At first plaintiffs were unable to meet the fee demands of Mr. Jacobson. However, they returned in October 1979 with sufficient funds to retain him. After travelling to Eufaula and conducting his own investigation, Mr. Jacobson discovered sufficient information to warrant contacting the International and demanding suit be filed against defendants. The International refused and instead forwarded the information provided to it by Mr. Jacobson to the Department of Labor for its consideration.

On May 1, 1980, plaintiffs sought leave from this Court to file suite against

defendants under Section 501(b). In their verified proposed complaint, plaintiffs asserted that defendants committed numerous violations of this fiduciary obligations as officers or representatives of Local Union 7326. The verified proposed complaint requested on accounting and reimbursement of any misappropriated strike funds. The Court heard testimony from the plaintiffs and determined that the good cause requirement of Section 501(b) was satisfied. The Court also found that plaintiffs had satisfied the statutory requirements that they first demand the International to bring suit against defendants. After further finding that the International had refused to sue the defendants, this Court allowed plaintiffs to proceed with their complaint.

On June 12, 1980, the International filed a motion to intervene in this lawsuit for the special purpose of seeking a

vacation of this Court's order allowing plaintiffs to commence this action. The Court allowed the International to intervene. When at a hearing plaintiffs contended that they were not union members at the time the suit was filed, this Court held that the plaintiffs lacked standing to bring this suite, and, therefore, withdrew its leave to file suit. Plaintiffs appealed, and the Court of Appeals reversed, holding that plaintiffs remained "members" of the union within the meaning of Section 501(b). See, Erkins v. Bryan,663 F.2d 1048 (11th Cir. 1981).

I. APPLICABLE LEGAL PRINCIPLES

The LMRDA was enacted in response to Congressional findings of widespread embezzlement and misuse of union funds by officers and representatives of union, Congress found that some supervision over union officials was necessary in order to

ensure the faithful discharge of those officials' fiduciary obligation. Note, Determining Breach of Fiduciary Duty Under the Labor-Management reporting and Disclosure Act: Gabauer v. Woodcock, 93 Harv. L. Rev. 608, 614 (1980). These fiduciary obligations were established in Section 501(a), which provides in pertinent part:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest and expect the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organizations such as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal

> interests which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization...

29 U.S. C. § 501(a). Section 501(b) grants a federal cause of action to members of a union to sue officers or representatives of this unions for breaches of the fiduciary obligations established in Section 501(a) where the union after demand either fails or refuses to sue 29 U.S. C. § 501(b).

Although Section 501 was designed as a direct and far-reaching response to union corruption and breach of trust, Morrissey v. Curran, 482 F. Supp. 31, 38 (S.D.N.Y. 1979), affirmed in pertinent part, 650 F.2d 1267 (2d Cir. 1981), Congress also contemplated a

limited judicial intervention into the internal affairs of labor unions. As stated in Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964):

> The provisions of the LMRD were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of the unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation.

Accord, Gabuaer v. Woodcock, 594 F.2d 662, 670 (8th Cir.), cert. denied, 44 U.S. 841 (1979). Furthermore, Section 501 counsels courts to consider the special problems and functions of labor unions in defining the scope of the fiduciary obligation. Farrington v. Benjamin, 468 F. Supp. 343,

352 (E.D. Mich. 1979). Taken together, these two principles evidence an intent by Congress, in enacting Section 501, to relieve union officials from stringent judicial review of their activities and ensure that special sensitivity be given to the unique nature of the labor union fiduciary. See generally, Leslie, Federal Courts and Union Fiduciaries, 76 Col. L. Rev. 1314 (1976).

Although courts have been unable to reach agreement on the precise scope of the fiduciary obligation, the clearest exposition of this standard may be found in Morrissey v. Curran, 650 F.2d 1267, (2d Cir. 1981).

> Section 501's emphasis on the particular facts of the case, in determining the appropriate fiduciary standard, and the policy underlying its enactment - preventing officers' misuse of union funds for their personal benefit - support judicial review of authorized expenditures that impart personal financial gain to those officers, just as courts would review self-interested transactions under the corporate common law. Under this standard, the court is not at liberty to review any compensation arrangements more generous that the court might have established. Section 501 does not convert judges into paymasters for union officers. The fiduciary standards for union officers impose liability upon them when they approve their receipt of excessive benefits, significantly above a fair range of reasonableness.

Unquestionably, a crucial issue in this case is the effect that should be given to the fact that most if not all the challenged expenditures were authorized either by the strike committee or William Caldwell, the staff representative from the International. Courts and commentators alike have struggled with this issue. One view holds that where an expenditure ids duly authorized, such authorization is a complete defense to an action under Section 501. See McNamara v.Johnston, 522 F.2d 1157, 1165-66 (7th Cir. 1975), cert. denied, 425 U.S. 911 (1976). See generally, Cox Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 829 (1960).

The other view directs courts to look beyond the authorization of a certain expenditure and assess the nature of the expenditure and the extent to which the

union official personally benefits from it. Although many of the challenged expenditures in the present case may have benefited the union, many also personally benefited the individual defendants. This second view mandates stricter judicial scrutiny where the challenged expenditure confers a personal benefit on the union official. Brink v. DaLesio, 496 F. Supp 1350, 1357 (D. Md. 1980), affirmed in pertinent part, 667 F.2d 420 (4th Cir. 1981). Again, Morrissey v. Curran, 650 F.2d 420 (4th Cir. 1981), represents the best illustration of what this Court agrees is the proper role for courts in these matters. The Morrissey court noted "that where a union officer personally benefits from union funds, a court in a Section 501(b) suit may determine whether the payment, notwithstanding its authorization, is so manifestly unreasonable as to evidence a breach of the fiduciary

obligation imposed Section 501(1)." Id. at 1274. Accord, Puma v. Brandenburg, 324 F. Supp. 536, 544 (S.D.N.Y. 1971). Moreover, the burden is on the official to prove that the expenditure was both validly authorized and reasonable. Brink v. DaLesio, 667 F.2d 420, 424 (4th Cir. 1981). This Court is persuaded that the Morrissey rule is consistent with the traditional, common law duties of fiduciaries and that the authors of Section 501(a) intended to impose such scrutiny upon payments to union officials.

With these principles in mind, the Court now turns to the specific charges of fiduciary breach made by plaintiffs. Before addressing these charges, however, the Court must first resolve the threshold issue whether plaintiffs' Section 501 suite was timely commenced.

I(a). TIMELINESS

Defendants contend that the appropriate statue of limitations bars recovery on plaintiffs' claim. The LMRDA in general and Section 501 in articular are silent on the issue of what statute of limitations, if any, governs a suite by union members against union officials for breach of the latter's fiduciary obligations. Therefore, the Court's present task is to determine the appropriate statute of limitations or other rule of timeliness that should apply to the facts of this case.

Defendants emphatically urge the Court to borrow the six-month limitations period found in Section 10(b) of the Labor-Management Relations Act, 29 U.S.C. § 160(b), and defendants maintain that DelCostello v. International Brotherhood of Teamsters, ___U.S.___, 103 S.Ct. 2281 (1983) compels such a conclusion. In DelCostello,

the Supreme Court held that the six-month limitations period of Section 10(b) applied to a "hybrid action" where an individual combines a fair representation claim against a union with a breach of the collective bargaining agreement claim against an employer. Crucial to this holding in DelCostello was the view that such hybrid claims, if proven, at least resembled if not constituted unfair labor practice charges under Sections 8(a) and 8(b).

Another reason advanced by the DelCostello court for applying the limitations period of Section 10(b) to these hybrid claims was that the "national policy considerations implicated in a hybrid action required application of the six-month period." Erkins v. United Steelworkers of America, 723 F.2d 837, 839 (11th Cir. 1984), quoting DelCostello v. International Brotherhood of Teamsters, ___U.S. at ___, 103 S.Ct. at 2294.

Defendants also cite the Court to Local Union 1397, United Steelworkers of America v. United Steelworkers of America, Civil Action No. 83-2888 (W.D. Pa., March 1, 1984) as authority for the proposition that the limitations period of Section 10 (b) should govern and bar plaintiffs' claims under Section 501. In the aforementioned case, plaintiffs, a local union and several of its members, brought suit under Section 411(a) of the LMRDA against the International Union. The International Union filed a motion to dismiss, asserting that Section 10(b) barred plaintiffs' claims. The Court, in granting the motion, extended the DelCostello holding to suits brought under Section 411(a) of the LMDRA The Court analogized Section 411(a) suits to fair representation claims and observed that since many fair representation claims involved unfair, arbitrary, or

discriminatory treatment of workers by unions and that the same union conduct could state a claim under Section 411(a), the application of Section 10(b) to Section 411(a) suits was proper under the DelCostello rational. Accord, Linder v. Berge, 567 F. Supp. 913 (D.R.I. 1983).

A close examination of the reasons stated by the DelCostello court for applying Section 10(b) to hybrid claims and by the Local Union 1397 court for applying Section 10(b) to Section 411(a) suits reveals that those reasons have little or no persuasive force to actions brought pursuant to Section 501. In ordinary hybrid claims and Section 411(a) suits, individual union members sue their unions for violations of one or more of the rights provided under Section 7 of the NLRA or section 411 of the LMDRA Unquestionably, such claims bear a close, family resemblance to unfair labor practice

charges under Section 8(b). Conversely, a suite under Section 501 against a union official for a breach of his fiduciary obligations neither constitutes nor resembles an unfair labor practice. A Section 501 suit is brought on behalf of the union to recover funds or other union property allegedly misappropriated by corrupt union officials. Unfair labor practice charges, fair representation claims, and Section 411(a) suits are brought against unions to redress allegedly wrongful union activity injuring individual union members. Moreover, the courts which have addressed the issue have uniformly held that a union cannot be sued for breach of a fiduciary duty under Section 501. Head v. Brotherhood of Railway Clerks, 512 F.2d 398 (2d Cir. 1975); Sabolsky v. Budzanoski, 457 F.2d 1245 (3d Cir.), cert. denied, 409 U.S. 853 (1972); Aho v. Bintz, 290 F. Supp. 577

(D. Minn. 1968). See generally, Leslie Federal Courts and Union Fiduciaries, 76 Col. L. Rev. 1314, 1323 (1976) ("[T]he theory of the cause of action is that the fault is individual, not institutional. Plaintiff has not been harmed by the institution - rather, the institution, and incidentally the plaintiff, have suffered at the hands of the defendant officers."). The Court must conclude, therefore, that the first reason stated by the DelCostello court for adopting Section 10(b) as the governing rule of timeliness for hybrid claims has no application to Section 501 accounting suits.

The DelCostello court also found that by applying the limitations period of Section 10(b) to hybrid claims, the proper balance between the national interest in stable bargaining relationships and the individual employee's interest in a just settlement of

his grievance could be maintained. Since the actions which give rise to a hybrid claim have the same destabilizing effects on the collective bargaining relationship as does an unfair labor practice, the Court determined that a uniform limitations period governing each type claim would promote the desired stability of that relationship. However, this interest in securing a stable bargaining relationship is conspicuously absent from Section 501 suits. An employee's interest in ensuring that union funds and property are not misappropriated by corrupt union officials, and this prosecution of a Section 501 suit in order to protect those interests, would have little effect on the stability of the collective bargaining relationship. Accordingly, the second reason for applying Section 10(b)'s limitation period as recognized by the DelCostello court likewise has no application here.

Defendants strongly urge that even if the policy considerations present in DelCostello are not present here, Section 10(b) should still apply in order to promote uniform limitation periods for all causes of action grounded in federal labor law. Moreover, defendants claim that the holding in DelCostello compels this result. The Court is of the opinion, however, that defendants read DelCostello too broadly. The Court does not believe that the DelCostello court intended that Section 10(b) govern all claims grounded in federal labor law, especially since the Supreme Court apparently ruled that an employee's claim against the employer for breach of the collective bargaining agreement, without an accompanying fair representation claim against the union, would still be governed by the most appropriate state statute of limitations. See, Erkins v. United Steelworkers, 723 F.2d 837, 839 (11th Cir.

1984). For all of the foregoing reasons, the Court concludes that the limitations period of Section 10(b) should not govern Section 501 suits.

The question then becomes what limitation period should govern this Section 501 unit. To resolve this questions, the Court must first determine the essential nature of a Section 501 suit under federal law. See, Sewell v. Grand Lodge of International Association of Machinists & Aerospace Workers, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1972). Plaintiffs here seed to compel the defendants to account for the challenged expenditures from the strike fund. As the Fifth Circuit observed in Local No. 92, International Association of Bridge, Structural, and Ornamental Iron Workers v. Norris, 383 F.2d 735, 740, (5th Cir. 1967), the relief sought in such action is

euippable in both name and substance. Since an accounting is properly characterized as an equitable remedy, this Court must heed the admonition expressed by the Supreme Court in Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946):

> Traditionally and for good reasons, statutes of limitations are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determing that which is decisive for the chancellors intervention, namely whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair.

Accordingly, this action, grounded in equity, should be governed by the doctrine of laches rather than a statute of limitations. Morrissey v. Curran, 482 F. Supp. 31, 40 (S.D. N.Y. 1979), affirmed in pertinent part, 650 F.2d 1267 (2d Cir. 1981); Yablonski v. Mine Workers, ___F. Supp. ___, 80 L.R.R.M. 2594 (D.D.C. 1971).

In order to establish their defense of laches, defendants must prove that plaintiffs inequitably delayed in instituting this action and that defendants were unduly prejudiced as a consequence of such delay See, EEOC v. Dresser Industries, Inc., 668 F. 2d 1199, 1202 (11th Cir. 1982). Defendants point to the fact that by July 1978, plaintiffs were at least suspicious that defendants had used strike fund money to acquire items such as automobiles and various household furnishings. Since this action was not filed until May 1980, defendants assert that recovery on plaintiffs' claims should be barred by the doctrine of laches. However, the Court disagrees and concludes that defendants have failed to discharge their burden of showing an in equitable delay by plaintiffs in bringing this action or prejudice to defendants resulting

therefrom. See Morrissey v. Curran, 482 F. Supp. 31, 40 (S.D.N.Y. 1979), affirmed in pertinent part, 650 F.2d 1267 (2d Cir. 1981).

After the strike concluded and the NLRB certified the results of the May 1978 election, plaintiffs became suspicious that defendants had used money from the strike fund for their own personal benefit. However, plaintiffs had no tangible proof that any of the personal property acquired by defendants had been obtained by illegal means. Plaintiffs, who like defendants are unsophisticated in legal or financial matters, later discussed their concerns with William Caldwell, a representative of the International. Unsatisfied with his response, plaintiffs decided to hire an attorney and conduct their own investigation. They contacted Mr. Jacobson in late June 1979 and discussed with him

their concerns about the strike and defendants' possible embezzlement of strike funds. Mr. Jacobson explained that he could not accept the case until a retainer was paid to provide for all costs and expenses that would be required in investigating the case and filing any lawsuits against defendants. Plaintiffs did not have the money at this time, but they returned to Mr. Jacobson in October 1979 with the necessary funds to retain him.

On November 30, 1979, Mr. Jacobson traveled to Eufaula, Alabama, to investigate this matter. A meeting was arranged with Mrs. Sandra Ward, the wife of union leader Walter Ward. At this meeting, Mrs. Ward presented to plaintiffs and Mr. Jacobson copies of a number of cancelled checks which had been paid to the four defendants. These cancelled checks represented the first tangible evidence that defendants might have

misused strike funds for their own personal benefit.

After this information was received by plaintiffs, Mr. Jacobson contacted the International in December 1979 and again in January 1980 and demanded that the International file suite against the four defendants for breach of their fiduciary obligations. On January 16, 1980, the International responded by refusing to file suit. On February 11, 1980, Mr. Jacobson renewed his request with the International, and this time he included the information about the cancelled checks which had been provided to him by Mrs. Ward. After further correspondence was exchanged, the International again refused to file suit; instead the International stated that it was turning all strike records of Local 7326 over to the Department of Labor for its determination whether an investigation

should ensue. Unsatisfied with the International's inaction, plaintiffs took leave to file suit against defendants from this Court on May 1, 1980.

Under these circumstances, the Court concludes that plaintiffs should not be barred by the doctrine of laches. When plaintiffs were first presented with tangible evidence of possible embezzlement of strike funds by defendants, they promptly contacted the International and demanded a suit by instituted against defendants. They were required to make this demand before they could file suit themselves. 29 U.S.C.§ 501(b). Despite being presented with evidence of a possible misappropriation of strike funds, the International opted to turn the matter over to the Department of Labor instead of bringing suit and informed plaintiffs of its intentions. Less than three months later, plaintiffs commenced

this action. Such conduct does not evidence an unreasonable or inexcusable delay by plaintiffs. Furthermore, even assuming that plaintiffs were privy to sufficient information to bring this suit in July 1978, defendants have not even suggested how they were prejudiced by plaintiffs' delay in commencing this action. The only possible prejudice this Court can discern that defendants may have suffered as a result of plaintiffs' delay was the fact that their recollection of the pertinent events may have been blunted by the passage of time. However, defendants have introduced no evidence that suggests that had plaintiffs commenced this action earlier, they could have verified the challenged expenditures, or produced evidence that could have substantiated the reasonableness of these expenditures.

I(b). BULLARD'S INCLUSION AS A DEFENDANT

There is one final preliminary matter. The Court must determine whether George Bullard is a proper defendant in this action. Section 501(a) imposes fiduciary obligations only upon "officer, agent, shop steward, or other representative" of the union. 29 U.S.C. § 501(a). Naturally, George Bullard maintains that he was never an officer, agent, shop steward, or representative of Local 7326. The Court believes, however, the the evidence establishes otherwise.

Before and shortly after the commencement of the strike, George Bullard served on the union's negotiation committee that met with company representatives during bargaining discussions. When no agreement was reached with the company and the union decided to strike, George Bullard was placed in charge of the picket line, where his

duties included the purchase of picket and union hall supplies and the organization of manpower schedules for the picket line. Bullard Deposition, p.6; Bryan Deposition, p. 18. He also testified in his deposition that he was paid a salary ranging from $60.00-$150.00 per week for his effort in running the picket line. Bullard Deposition, pp. 14, 21. When the union decided to institute and pursue a boycott of the company's products, George Bullard played a significant role in the implementation of that boycott. In fact, Billy Bryan testified that George Bullard and Arthur Comer were "the main ones that ran the boycott." Bryan Deposition, p. 42.

the Act defines "officer, agent, shop steward, or other representative" in 29 U.S.C. § 402(q). This provision reads as follows:

> (q) "Officer, agent, shop steward, or other representative", when used

with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel.

See Note, The Fiduciary Duty Under Section 501 of the LMRDA, 75 Col. L. Rev. 1189, 1193 n.22 (1975). In accordance with this expanded view of those persons vested with fiduciary obligations, the Court must conclude that George Bullard is a proper

defendant in this Section 501 suit and may be liable for any misuse by him of strike funds.[3/]

II. ALLEGED MISAPPROPRIATION OF FUNDS BY DEFENDANTS

The Court now turns its attention to plaintiffs' specific allegations of impropriety by the defendants.

As noted earlier, approximately three hundred members of Local 7326 went on strike in December 1976. In order to assist these strikers, a strike and defense fund was established by the officers of Local 7326 in accordance with the directions from the International. This account was funded by

3. George Bullard points to the fact that he was dismissed as a defendant from the parallel criminal proceeding when the trial court concluded that the evidence was insufficient to warrant a finding that he was an "officer" of Local 7326 within the meaning of Section 501(c). The different burden of proof between criminal and civil cases, however, forecloses any preclusive effect that decision might have in the present case.

the International, and the amounts periodically sent were determined by multiplying the number of strikers (300) by the weekly rate of strike benefits (originally $20.00, but increased to $30.00 in September 1977). This rate of calculation remained constant throughout the strike despite the fact that many of the members of Local 7326 eventually abandoned the strike and at such time received no weekly benefit.

The total expenditures from the strike and defense fund for the three hundred members of Local 7326 exceeded $450,000.00 of this amount, the four defendants received approximately $140,000.00, or thirty-one percent. The average amount thus received by each of the four defendants was $35,000.00 for the period of the strike, approximately eighteen months. while the Court does not believe that these amounts or

the high percentage of the total received by these four defendants by itself proves embezzlement or misappropriation of strike funds, it does at least demonstrate a need to closely examine the challenged expenditures to determine whether any such expenditure was either not authorized by the appropriate officials or unreasonable in amount. The checks received by defendants may be grouped into three categories: (1) trip expenditures; (2) strike benefits and other related expenditures; and (3) third-party expenditures. The court will examine each category of checks in turn.

II(a). TRIP EXPENDITURES

As noted earlier, defendants were often required to travel to various location in seeking support for the boycott. Other trips were for conferences with union officials and attorneys in Birmingham, contract negotiations in Atlanta and Mobile,

and NLRB charges in Montgomery. No one questions the legitimacy of the purpose of these trips.[4/]

It is not altogether certain from the evidence who decided that a particular trip was necessary Billy Bryan testified that he occasionally decided a trip should be taken. On other occasions, the strike committee requested one or more of the defendants to travel to a certain location on union business. In any event, the four defendants were involved in nearly every trip; rarely did anyone other than the defendants participate. Arthur Comer testified in deposition that the membership selected him to go on trips to

4. Plaintiffs do, however, contest the legitimacy of several trips taken by defendants subsequent to the conclusion of the strike. For the reasons stated herein, the Court shall not compel defendants to reimburse the union for strike funds received for trips taken subsequent to May 18, 1978, the date the election was lost.

promote the boycott. Comer Deposition, p. 19. Charlie Greene stated that he first became involved with the trips by volunteering, and he further stated that anyone who volunteered could have gone. Billy Bryan testified that he knew of no one who was denied the opportunity to participate in the trips if he had requested that opportunity. The Court does not find unreasonable the fact that only these four defendants participated in the great majority of the trips. Nor shall it require reimbursement from these defendants solely for that reason. Reimbursement, if required shall be for the sole reason that the amounts which defendants took for themselves allegedly to cover their expenses were manifestly unreasonable in light of all the circumstances. Moreover, there is some burden on officials who receive such substantial amounts of money to prove the

reasonableness of the sums taken by them. Brink v. DaLesio, 667 F.2d 420, 424 (4th Cir. 1981).

Once it was deemed necessary to take a trip, those who were to make the trip went to the strike committee to get expense checks. Normally, these checks were obtained by each defendant before the trips were taken. However, on a few occasions defendants obtained the check after they returned; also, one defendant would occasionally pick up his check and the check provided by the strike committee for the other person or persons who were to accompany him on the trip. Bryan's Deposition, p. 12.

The amount of the check was allegedly determined by estimating the mileage to and from the location along with the number of days the trip was expected to take. Estimates were purportedly based on expenditures required on previous trips to

the same location. Defendants were allowed $50.00 per day to cover their meals and lodging.[5/] Defendants stated that they ordinarily stayed in separate rooms, and Howard Strevel, a representative of the International, testified that this practice was not unreasonable. Nor does the Court find this practice unreasonable, although in view of the precarious finances of the striking employees more economical arrangements would have been more prudent. Mileage expenses were computed at a rate of fifteen cents per mile. However, despite the surprising testimony from Charlie Green and George Bullard to the contrary, obviously only those who furnished the car and provided the gasoline were entitled to reimbursement for mileage. Howard Strevel

testified to the obvious fact that it would be improper for a defendant to be reimbursed for mileage expenses when he was merely a passenger. No one, however, turned in any receipts or other documentation of actual expenditures on any trip.[6/]

According to defendants, money allocated to a particular person would not necessarily be spent solely by that individual. Sometimes those who went on a particular trip would pool their money because it was difficult to estimate one's expenses

6. Arthur Comer testified, however that he kept his receipts from these trips in a cardboard box located at the union hall. These receipts were not produced as evidence at trial, and no one knew of their whereabouts.

The trips did not always have a precise destination. There were numerous stops along the way. Defendants frequently followed the company's trucks to a certain destination, where, upon arrival, defendants would meet with representatives from the local unions and urge them to support the strike and boycott. Occasionally, when the defendants would travel to a particular site, they would conclude their business at that location and then travel in a different direction to another site. Comer's Deposition, pp. 10-12. Moreover, once the defendants reached a particular destination, they would often split in different directions to visit other sites to promote the boycott.

On many occasions, more than one automobile was taken on a trip. Charlie Greene testified that when all four leaders went on a particular trip, the normal

procedure was to take two automobiles, since the defendants would often travel in different directions to other sites once they reached their primary destination. Arthur Comer also testified that sometimes it became necessary for one person to stay at a particular destination while another defendant returned to Eufaula with information about the progress of the boycott. At other times one or more of the defendants would have to return to Eufaula to resolve various problems that arose on the picket line or at the union hall.

In nearly every instance, defendants were unable to recall where they travelled on a particular trip, where they stayed, the duration of the trip, or how many cars were taken on the trip. Their only recollection was that they were certain that they travelled during the strike to the various locations previously mentioned, and that

those trips occupied a substantial portion of their time, especially during the latter stages of the strike. Of course, defendants maintain that all funds provided to them for these trips were proper.[8/]

While the Court will not require defendants to reimburse all strike funds given to them for trip expenses on the ground that they kept inadequate records or were unable to remember after six years where and how the money was spent, at the time it cannot exonerate defendants where they kept inadequate records and received what clearly appears to be excessive amounts simply because their memory failed them. Were the Court to do so, it would establish a precedent that would allow union officials

8. Both Charlie Greene and George Bullard testified that they returned from some trips with excess money. They both testified that this extra money was used, however, on subsequent trips.

to escape liability under Section 501 by merely confession a lack of records and memory. Rather, the Court must examine each challenged trip expenditure in light of the standards enunciated in Morrissey, supra, and determine whether a particular expenditure is so manifestly unreasonable as to evidence a breach of the fiduciary obligations imposed upon defendants by Section 501(a). Obviously this cannot be done with exactness. The Court attempts the task in an effort to be fair to the defendants who did most of the work during the strike, but with an awareness that some of the sums paid to defendants appear excessive and not reasonably justified.

Since defendants could not remember where they travelled on any trip, where they stayed, the trip's duration, or how many automobiles were taken, the Court will determine the reasonableness of the amount

of a particular check by generously allowing for a three-day trip of 800 miles with two automobiles.[9/]

Where the amount received by a defendant exceeds the sum of reasonable expenses so incurred by him, a reimbursement of this excessive amount will be ordered. For example, assuming two defendants took a trip for the union and each received a check for $300.00. Allowing for a three-day trip of 800 miles with two automobiles each defendant would be entitled to receive $270.00 ($150.00 for meals and lodging and $120.00 of mileage expenses), or a sum of $540.00. After subtracting $540.00 from the sum of the two checks received by

9. On those occasions where Charlie Greene and only one other defendant took a trip for the union and received a check, the Court will only allow for mileage expenses for one automobile since Greene testified that he drove his automobile on only one trip.

defendants, the Court would reach a figure of $60.00 which represents the total amount of excessive, unauthorized strike fund expenditures, and after further dividing that sum by two, the Court would order each defendant to reimburse $30.00 to the union.

Some trips undoubtedly took more than three days and covered more than 800 miles. At the same time, however, many trips took greatly less than three days, covered substantially less than 800 miles and were traversed in only one automobile. Although the Court's analysis has its shortcomings, the Court believes that a more precise or fairer analysis is unattainable.

Defendants received approximately $35,300.00 as compensation for expenses incurred for trips taken on behalf of the union. The number of trips reportedly taken by each defendant and the money received as

compensation therefor are as follows:

DEFENDANT	NUMBER OF TRIPS	MONEY RECEIVED
Charlie Greene	30	$ 9,667.00
Arthur Comer	32	10,440.51
George Bullard	26	9,279.01
Billy Bryan	22	5,937.00

After examining each trip taken by defendants using the aforementioned analysis (except for those challenged trip expenditures specifically discussed below), and arriving at a figure which represents the some of reasonable expenses incurred by each defendant on a particular trip, the Court determines that defendants should repay to the union the following amounts, which represent the total amount of excessive unauthorized strike fund expenditures:

DEFENDANT	AMOUNT
Charlie Greene	$4,422.41
Arthur Comer	3,206.41
George Bullard	2,684.08
Billy Bryan	1,843.08

As previously mentioned, a discussion of several of these trip expenditures is in order. Where reimbursement to the union is in order, the amount of reimbursement has already been included in the above-listed amounts for each defendant.

On or about November 9, 1977, defendant Greene took a trip for the union and received a check for $430.00. At trial, he did not remember the purpose of the trip, where he travelled, or how long he stayed. He testified that he only took his car on one occasion and the Court will treat this trip as that occasion. Allowing for a three-day trip of 800 miles, the Court arrives at a figure of $270.00, which represents the sum or reasonable expenses

incurred by Greene on this trip. After subtracting $270.00 from $430.00 to reach an amount of $160.00, which represents the total amount of excessive, unauthorized expenditures the Court concludes that Greene should repay $160.00 to the union.

Five days later, on November 14, 1977, Greene received another check for $430.00. The stated purpose for this check was "Union Business." Although he could not remember what "union business" meant, he testified that he probably received this check to cover expenses for a trip. However, since he testified that he drove his automobile on only one occasion, and since the court had just previously analyzed a trip expenditure where he was the only defendant who took a trip and received money therefor, the Court must conclude that this expenditure is wholly unauthorized and that Greene should repay the entire amount of this check

($430.00) to the union. The same analysis applies to check numbers 4604 ($300.00), 6267 ($300.00) and 6751 ($375.00), which Charlie Greene received as reimbursement for trip expenses on December 13, 1977, April 17, and June 10, 1978, respectively, and the Court concludes that Greene should repay the sum of these three checks ($975.00) to the union.10/

On or about November 21, 1977, defendant comer received a check for $200.00. On or about November 22, 17=977, another check for $305.00 was made out to comer. He testified that these checks were undoubtedly given to him for trips. He further testified that it would be improper to attach significance to

10. Greene attempted to explain his receipt of these checks by testifying that the check may have been issued to him to cover his and another defendant's trip expenses. Unquestionably, such practices did occur. However, on such occasions, the records would clearly indicate that a particular check was intended to cover the trip expenses of more than one defendant. See, e.g., Check Number 5479.

the fact that the checks were written only one day apart. He stated that this should not be taken to mean that the first trip lasted only one day; often a check for a particular trip would be were written several days before or after the date the trip was actually taken. The Court credit this testimony as accurate since other defendants testified similarly. Therefore, the Court will allow for a six-day trip of 1,000 miles and arrive at a figure of $450.00, which represents the sum of reasonable expenses incurred by Comer on these two trips. After subtracting $450.00 from the sum of the two checks ($505.00) to reach an amount of $55.00, which represents the total amount of excessive, unauthorized expenditures, the Court concludes that Comer should repay $55.00 to the union.[11/]

11. The same analysis applies to the check for $172.00 which Comer received on April 22, 1978. Plaintiffs contend that Comer could not have used this check for a

two automobiles, the court arrives at a figure of $540.00, which represents the sum of the reasonable expenses incurred by Bullard and the unknown traveler. After subtracting $540.00 from $670.00 to reach an amount of $130.00, that represents the total

11. Continued On or about December 17, 1977, defendant Bullard took a trip to Mobile for the union and received a check for $670.00. The financial records indicate that this check was to cover expenses for tow people to travel to Mobile. Bullard could not recall who travelled with him on this trip, and the records give no clue. The Court will give Bullard the benefit of the doubt since the voucher indicates someone else was to accompany him on this trip. Assuming a three-day trip of 800 miles and allowing for trip since he received another check that same day to cover expenses for a trip he was to take with Bullard. See check number 6345. This contention ignores, however, Comer's testimony that he often received his trip expense check after he returned from a trip. The Court will treat his receipt of this check as such an occasion. Allowing for a two-day trip of 800 miles, the Court arrives at a figure of $220.00, which represents the sum of reasonable expenses incurred by Comer on this trip. Since the sum of his reasonable expenses exceeds by $48.00 the check he received, the Court will offset this $48.00 against the amount of excessive, unauthorized expenditures previously calculated by the Court.

amount of excessive, unauthorized expenditures, and after dividing $130.00 by two, the Court concludes that Bullard should repay $65.00.

On or about January 6, 1979, defendant Bullard received a check for $735.00. although the records do not indicate the purpose of this check, the check stub indicates that it was used for a trip for the union. Bullard could not recall where he went on this trip or if anyone accompanied him. He did recall that his furthest destination on these trips was West Virginia. The Court will assume that he traveled to West Virginia on this trip. Allowing for a six-day trip of 2,000 miles, the Court arrives at a generous figure of $600.00, which represents the sum of the reasonable expenses incurred by Bullard on this trip. After subtracting $600.00 from $735.00 to reach an amount of $135.00, which

represents the total amount of excessive, unauthorized expenditures, the Court concludes that Bullard should repay $135.00 to the union.

On or about January 13, 1977, Billy Bryan was given a check for $70.00 for the purpose of attending contract negotiations in Atlanta, Georgia. He cashed the check out of funds from his church and was prepared to travel to Atlanta when, unexpectedly, he had to remain at home with his wife who was giving birth to his youngest child. He testified that he gave this money to Frazier Farrier, his substitute at the Atlanta negotiations. plaintiffs challenge his testimony since there is no documentation that this $70.00 was actually given to Mr. Farrier. After hearing Mr. Bryan's testimony concerning this matter, the Court credits his testimony

and will not require reimbursement of the $70.00.

On or about April 10, 1978, Billy Bryan received a check for $310.00. The financial records indicate that this check was issued to cover Bryan's expenses on a trip. Plaintiffs contend that Bryan never used this money for a trip since the check was endorsed to Sears and used as a partial payment of an air conditioner that he had purchased at Sears. However, the mere fact that this check was endorsed to Sears does not prove that Bryan never went on this trip or that he failed truthfully to disclose to the strike committee the real purpose for this check. Since defendants testified that occasionally they would receive their trip expense checks after they returned from a trip, the Court will treat Bryan's receipt of this check as such an occasion and will

not order full reimbursement.[12/] Rather, allowing for a three-day trip of 800 miles, the Court arrives at a figure of $270.00, which represents the sum of reasonable expenses incurred by Bryan on this trip. After subtracting $270.00 from $310.00 to reach an amount of $40.00, which represents the total amount of excessive, unauthorized expenditures, the Court concludes that Bryan should repay $40.00 to the union.

On June 24, 1978, defendant Bryan took a trip for the union and received a check for $150.00. This trip occurred weeks after the strike concluded Bryan testified that following the conclusion of the strike,

12. The same conclusion applies to check numbers 5567 ($200.00) and 5743 ($342.50), both of which were used as payments for furniture which Bryan purchased at the Gunter-Dunn Furniture Company. These two checks were previously analyzed and included in the group of trip expense checks discussed earlier.

unfair labor practice charges were filed against the company, and that pursuant to these charges being filed, he travelled to Birmingham on several occasions to meet with representatives from the International and its attorneys. Plaintiffs' challenge to Bryan's receipt of this money in denied.

On or about May 27, 1978, defendants Greene, Comer, and Bryan took a trip to Tampa for the union and each received a check for $425.00. This trip occurred after the strike was over. Defendants claim that the boycott was still in operation, and a trip was necessary to inform local unions that the strike had been lost Plaintiffs not unreasonably contend that the objectives of the trip could have been accomplished by telephone, but the court will not substitute its judgment as to the propriety of this trip for that of the union leaders. The reasonableness of the expenditures, however,

is subject to the same analysis heretofore subjected to all previous trip expenditures. Allowing for a three-day trip of 1,000 miles with two cars, the Court arrives at a figure of $750.00, which represents the sum of the reasonable expenses which will be allowed to these defendants on this trip. After subtracting $750.00 from the sum of the three checks ($1,275.00), the total amount of excessive, unauthorized expenditures is $525.00. The Court concludes that Greene, Comer, and Bryan should each repay $175.00 to the union.

On or about June 3, 1978, defendants Greene, Comer and Bryan took another trip for the union. Greene received a check for $450.00, Comer received a check for $425.00, and Bryan received a check for $395.00. Although he was not certain about the destination of this trip, Greene testified

that he thought the defendants travelled to numerous cities and docks in Georgia, South Carolina, and Florida to spread the work about the election and the union's continued efforts in support of the boycott. Again, the Court will not substitute its judgment as to the propriety of this trip, but it will assess the reasonableness of the expenditures. Generously allowing for a four-day trip of 1,200 miles and two cars, the Court arrives at a figure of $960.00, which represents the sum of the reasonable expenses incurred by these defendants on this trip. After subtracting $960.00 form the sum of three checks ($1,270.00), the total amount of excessive, unauthorized expenditures is $310.00, and the Court concludes that Greene, Comer and Bryan should each repay $105.00 to the union from the sums they received for this trip.

II(b) STRIKE BENEFITS AND OTHER RELATED EXPENDITURES

A second group of checks received by defendants and challenged by plaintiffs may be collectively referred to as strike benefits and other related expenditures. In these challenges, plaintiffs place primary emphasis on the fact that defendants generally received more strike benefits per month than other strikers. Plaintiffs therefore demand reimbursement of an amount equivalent to the excess of the monthly strike benefits received by each defendant over the amount of monthly strike benefits received by the average striker during the same time period.[13]

13. Prior to September 1977, the normal amount of strike benefits each striker was authorized to receive if he performed the minimum amount of work for the union was $20.00 per week, or $85.00 per month. After September 1977, this amount was increased to $30.00 per week or $125.00 per month. Also, each striker received a $75.00 Christmas bonus in December 1977.

Since there are over one hundred twenty five checks received by defendants in this second category of challenged strike fund expenditures, the Court first will list the checks received by each defendant in Appendix A. The Court then will proceed with a general discussion of whether the receipt of these checks by defendants was authorized and whether the amount was reasonable. following this general discussion, the Court will analyze several of the more questionable checks received by each defendant. See Appendix A.

The determinative issue for the Court is whether defendants were accorded improper, preferential treatment over the rank and file members in the receipt of strike benefits, taking into account the defendants' greater expenditures of time and

effort in furtherance of the strike and their forbearance of other employment opportunities in order to maintain the strike. Plaintiffs would have this Court hold that regardless of the greater efforts expended by defendants in comparison with the average striker, defendants should receive no greater amount of benefits. However, if defendants' efforts during the strike were materially greater than those of the average striker, then this Court believes that it would be unreasonable to limit them to comparable strike benefits. Indeed, a contrary result would inhibit members from providing the necessary day-to-day leadership of the strike if uncommon effort would receive no more consideration than the limited activity of the rank-and-file member who merely walked his eight-hour shift each week on the picket line. Moreover, the Court is not at liberty

to revise any compensation arrangements merely because they may have been more generous than the Court might have established. Morrissey v. Curran, 650 F.2d 1267, 1275 (2d Cir. 1981). The Court's task is limited to a comparison of the hours expended and benefits obtained by defendants with the hours expended and benefits obtained by their average striker. Only where the differential in compensation in manifestly unreasonable on such an analysis will this Court find a violation of Section 501(a).

The Court finds that the average striker would receive $30.00 per week after September 1977 for walking one eight hour shift at the picket line. If the striker walked more than one shift, he would receive $30.00 for each additional shift.

Charlie Greene testified that the strike committee authorized his receipt of $30.00

per day as compensation for his assisting the treasurer, Walter Ward, in the preparation of the strike ledgers and financial reports. He testified that he worked on the ledgers and other financial books from three to four days per week, every week. When Ward abandoned the strike and returned to work for the company, Greene assumed the full duties of the Treasurer. William Caldwell testified that it was not uncommon for those who worked on financial records during a strike to receive additional compensation therefor. Greene also testified that in addition to his work on the books, he occasionally walked shifts on the picket line. Finally, his role in maintaining the boycott involved his making numerous long trips.

Arthur Comer testified that he received extra strike benefits for his role as a picket captain for the third shift, which he

testified in his position required his presence every day on the picket line between 11:00 p.m. - 7:00 a.m. Comer's Deposition, pp. 41-42. Once the boycott began, he also made numerous trips for the union.

Billy Bryan testified that his duties as President of Local 7326 required him to work twelve to sixteen hours per day for five to six days per week, sometimes sever. He stated that he did not have time for other jobs; he also stated that other strikers, most notably Walter Ward, asked him to forego other employment and devote his full time and efforts to running the strike. Since his home was more than twenty-five miles from the union hall and picket line, and since his duties required him to make this trip nearly every day, the strike committee authorized him to receive $50.00 per week to cover his expenses of travel to

and from home. The committee also agreed to pay for his personal bills such as mortgage and utilities. He also was required to take numerous, lengthy trips for the union in support of the boycott.

George Bullard testified that members of the strike committee approached him and asked him to oversee the picket line and union hall operations during the strike. this was a full-time job which required him forego employment elsewhere. In return for his agreeing to oversee the picket line and union hall, the strike committee offered to pay his monthly bills. His responsibilities in maintaining the picket line and union hall included the purchase of necessary supplies. He testified that he would purchase these supplies with his own money, take the receipt to the strike committee, explain the reason for the purchase, and receive reimbursement therefor. Since he

also participated in the boycott trips, he was required to spend a large amount of time on the road in furtherance of the boycott.

After examining the evidence with an eye toward the quantity of work for the union performed by defendants vis-a-vis the average striker, a clear picture emerges. While some strikers worked diligently for the union, expending great effort and foregoing other employment, the evidence conclusively shows that no one placed more time and effort into the stride than defendants, especially when considering the trips taken by defendants on behalf of the union. William Caldwell and Howard Strevel testified that it is expected that those who perform greater service for the union in aid of the strike will receive more compensation from the strike fund. With many strikers abandoning the cause, finding jobs elsewhere, or expending as little effort as

possible to continue receiving strike benefits, it is the strike leaders who often save the strike from collapse, hence the need for greater compensation.

In light of the foregoing evidence, the Court must conclude that the disparity in strike benefits between defendants and other strikers was not so unreasonable as to establish a per se violation of Section 501(a). Despite the Court's general acceptance of the checks listed in Appendix A as both authorized and reasonable, a discussion of a few of the more vigorously challenged checks in in order.

On or about October 1, 1977, Charlie Green received a check for $300.00 with the stated purpose "strike benefit/medical expense." He explained during the trial that his wife underwent surgery at the Barbour County Hospital during this time period and this check undoubtedly was used

to defray a portion of those medical costs. Since many checks were written on the strike fund account for the payment of strikers' medical bills, the Court finds this expenditure reasonable.[14]

On or about September 3, 1977, Arthur Comer received a check drawn on the strike fund account in the amount of $228.00. The purpose stated in the ledgers for this check was "Five Weeks Strike Benefits." An examination of the August 1977 ledger reveals that Arthur Comer in fact received no strike benefit checks in August. Accordingly, the Court finds this strike fund expenditure reasonable.

On or about June 10, 11978, Billy Bryan received a check drawn on the strike fund account in the amount of $175.00. The purpose stated in the ledger for this check

14. Charlie Greene testified that the need for this check was fully disclosed to the strike committee at the time or

receipt. The Court, therefore, will not accept plaintiffs' argument that since Greene could not produce the medical bills at trial, this strike fund expenditure should be found unauthorized and ordered reimbursed. The Court credits Charlie Greene's testimony of full disclosure of and a documented need for this payment. was "Personal Bills." Plaintiffs contend that since the records do not indicate which bills were paid with this check, and since no receipts were offered by Bryan as supporting documentation for this check, then this expenditure should be repaid to the union. The Court disagrees. The financial records indicate that the only other monthly bill which was paid with strike funds in June 1978 was a water bill for $14.20 owed to the Bakerhill Water Authority. See Check No. 6787. Furthermore, Bryan testified that he continued to work for the union weeks after the election was lost, which indicted to the Court that his receipt of these strike funds for the payment of monthly bills was

reasonable.

On or about December 3, 1977, Billy Bryan received a $300.00 loan from the strike fund. The financial records indicate that this loan was repaid in full, and Bryan testified that repayment was accomplished by his performing additional work for the union. Plaintiffs contend that the additional checks Bryan received in December 1977 for strike benefits and monthly bill payments more than compensated Bryan for any extra work he performed for the union Given the undisputed testimony that Bryant often worked from twelve to sixteen hours per day for six to seven days per week, the Court credits Bryan's testimony concerning repayment of this loan and concludes that reimbursement is not required.

All defendants except Bullard received checks several months after the strike ended, which were authorized by William

Caldwell for the purpose of compensation for "lost time and expenses." The check Comer received in December 1978 is fully documented and explained in Defendants' Exhibit No. 2. As for the checks received by Greene (#6812) and Bryan (#6814), defendants testified that they often had to meet with Mr. Caldwell and other representatives form the International after the strike concluded because the union had filed NLRB charges against the company. Additionally, certain financial reports required by the Department of Labor had to be completed and assistance was needed form Bryant and Greene in order to accomplish this task, the Court finds these strike fund expenditures, which were duly authorized by Mr. Caldwell, to be reasonable and not violative of Section 501(a).

Having examined each check in this second category of strike fund expenditures,

the Court concludes that defendants, in receiving these checks, did not breach any fiduciary duties imposed upon them by Section 501(a). This conclusion is based upon the Court's belief that greater financial assistance was due defendants as compensation for their greater expenditure of time and effort toward the furtherance of the strike.

II(c). THIRD-PARTY EXPENDITURES

The third and final category of checks received by defendants and challenged by plaintiffs may be collectively referred to as third-party expenditures. These checks represent instances where defendants used strike funds to pay personal bills or other obligations unrelated to the union business. As with the trip expense checks

received by defendants, the Court has analyzed each challenged expenditure and determined whether it was so manifestly unreasonable as to evidence a breach of the fiduciary obligations imposed upon defendants.

On or about March 25, 1978, defendant Greene received a check for $312.00 with the stated purpose of "tires and car repair." Green testified that he only used his automobile on one trip. Howard Strevel, the representative form the International, stated that it would be an unauthorized strike fund expenditure for a striker to have his automobile repaired and new tired installed if that automobile were not used primarily for union business. Under these circumstances, the Court is of the opinion that Greene should not have received strike funds for new tires and car repairs. The same result holds for the $200.00 check he

received on April 29, 1978, with a stated purpose "M. N. Hughes Tire Co." The Court must conclude that Greene should reimburse the union in an amount equivalent to the sum of these two checks ($512.00).

A similar result should apply to Greene's receipt of check number 5923 ($128.52 - payable to Sears), George Bullard's receipt of check number 6717 ($120.00 - payable to Skinner Furniture), and Billy Bryan's receipt of check numbers 6175 ($150.00) and 6732 ($75.00), both payable to Ezzell's, a retail clothing establishment. Greene could not recall what he purchased with his check made payable to Sears. Bullard used his check to purchase a mattress; prior to receiving this check, Bullard had begun work at Cutler Egg Products. Bryan used his checks to pay in full a clothing bill at Ezzell's. While the Court accepts as reasonable defendants' use

of strike funds to pay monthly obligations such as mortgages, automobile loans, and utility bills, the Court cannot find reasonable defendants' use of strike funds to purchase these various items of personal property, especially where there was no evidence that other strikers were given strike funds to make similar purchases and compensation to these defendants was already greatly in excess of benefits to other strikers. Accordingly, the Court concludes that defendants should repay the aforementioned amounts to the union.

On March 7, 1978, Greene received a check for $840.00 from the strike fund and used that money to pay in full a debt he owed to the Pacific Finance Company. Charles Cook, office manager at the Dothan branch of Trans-America Financial Services, which during the strike was doing business as the Pacific Finance company, testified at

the criminal trial that Pacific Finance Company would have been willing to continue accepting the small monthly payments of $20.00 that Greene had been making theretofore. Plaintiffs' Exhibit No. 13. He also testified that on February 24, 1978, Mrs. Greene called him to inquire about the possibility of settling the account in full. He told Mrs. Greene that the company would accept $840.37 as full payment on the account Nearly two weeks later, he received a check from Mr. Greene for $840.00. William Caldwell testified that it would be an unauthorized strike fund expenditure for a stiker to pay a bill in full when the creditor was willing to continue receiving smaller monthly payments. Under these circumstances, the Court must conclude that payment in full of this credit account was an unreasonable strike fund expenditure. However, the Court will consider reasonable

a portion of this payment that represent six monthly payments of $20.00, or $120.00, which signifies a period from March through August when Greene was on strike or unemployed immediately following the strike. Accordingly, the Court concludes that Greene should repay $720.00 to the union.

On May 13, 1978, Greene received a check for $419.80 from the strike fund and used that money to pay in full a VISA account Greene maintained with the First National Bank of Mobile. Mike Bishop, a credit card officer with the bank, testified at the criminal trial that Greene's account was current at the time full payment was made. Plaintiffs' Exhibit No. 14. He also testified that the bank would have been willing to continue accepting the $25.00 monthly payments that Greene had made theretofore. For the same reasons the court

found unreasonable the use of strike funds to pay in full the debt owed to the Pacific Financial Company, it finds this payment unreasonable. Again, however, it will allow as a reasonable expenditure $100.00, which represents monthly payments of $25.00 from May through August, the date Greene gained full-time employment. Accordingly, the Court concludes that Greene should repay $319.80 to the union.

On June 24, 1978, Greene received a check for $175.00 form the strike fund and used that money for a car payment. Plaintiffs contend that this check, written some five weeks after the strike concluded, is manifestly unreasonable The Court disagrees. Mr. Caldwell informed the four defendants in either April or May 1978 that they could use strike funds to make post-strike payments on their mortgages or automobile loans. The reasons stated by Mr.

Caldwell for this special treatment is that strike leaders typically find it more difficult obtaining employment after a strike than do rank and file members. Mr. Strevel testified that it was common practice for strike leaders to receive these post-strike payments. In view of these circumstances, the Court cannot conclude that this use of strike funds by Greene was either unauthorized or unreasonable, particularly where the International, whose agent authorized the payment, is the party for whose benefit this suit is maintained.

On or about March 18, 1978, Bullard received a check for $136.00, with the purpose of the check being payment of his utility bills and a bill at Hughes Tire Company. He received a check for $312.00 on March 27, 1978, for the purpose of automobile repairs and net tires. Both Howard Strevel and William Caldwell

testified that such a payment would be a proper strike fund expenditure if the donee of such payment used his automobile on union business. Since Bullard extensively used his automobile for union purposes such as boycott trips and maintaining the picket lines, the Court finds these two checks to be authorized, reasonable strike fund expenditures.

On June 10, June 17, and June 24, 1978, Bullard received checks of $120.00, $75.00, and $100.00, respectively. There was no stated purpose for the first two checks, but "utilities" was the stated purpose for the third check. Plaintiffs contend that since the election was lost on May 18, 1978, and since Bullard went to work with Cutler Egg Products at approximately the same time the election was lost, these checks cannot be authorized strike fund expenditures. Regarding the first two checks with no

stated purpose, Bullard testified that he normally purchased the necessary supplies for the picket lines with his own money and would obtain a receipt therefor. He would then take the receipt to the strike committee and receive reimbursement for his expenses. He also testified that occasionally he would not seek reimbursement for each purchase of supplies for the picket line until weeks later. Although Bullard could not recall whether these checks represented an occasion when he received late reimbursement for earlier purchases of picket line supplies, the Court will treat these checks as such late reimbursements as will not require his repayment of this money to the union. Alternatively, the Court could treat these checks as representing compensation to Bullard for the assistance he provided the union on Saturdays after the strike was lost. The court does not

believe, however, that it was reasonable that his utility bills should be paid with strike funds a full five weeks after he was employed with Cutler. Accordingly, the Court concludes that Bullard should repay this $100.00 to the union.

On May 27, 1978, Comer received a check for $310.26 and used that money for the payment of an automobile loan he had with Central Bank. William Caldwell had previously authorized defendants to use strike funds to meet their loan obligations because strike leaders often had difficulty securing employment after the strike. This authorization, coupled with the fact that hundreds of strikers' loan obligations had been paid with strike funds, leads this Court to conclude that this expenditure of strike funds was both authorized and reasonable. The same analysis applies to Comer's receipt of a check for $165.00 on

June 10, 1978, said check being written to cover another loan obligation at Central Bank.

On or about January 28, 1978, Bryant received a check for $130.00, and on March 4, 1978, he received another check for $200.00. The purpose stated for both checks was payment of "medical bills." Plaintiffs contest these strike fund expenditures on the ground that they lacked the proper description of the health carrier involved. Plaintiffs point to the fact that Bryant received other checks for the payment of medical bills that clearly denoted the physician or health institution to which payment was made. Bryant testified, however, that his duties never included responsibility of entering the strike fund disbursements into the ledger or journal. The fact that the in financial records, which were prepared in different ways by

different people, do not indicate the health carriers to whom these payments were made does not, in this Court's opinion, necessarily render those checks unauthorized. The Court credits Bryant's testimony of a disclosed need for these checks and concludes that reimbursement is unnecessary.

On or about December 22, 1977, Bryant received a check for $76.05 for payment of his automobile insurance premium. A second premium was paid by a check for $70.60 which Bryant received on May 27, 1978. These two checks covered insurance on his 1972 Buick. Previously, on February 8, 1978 and on April 10, 1978, he had received checks of $161.68 and $295.75, respectively, for payment to Ladon Parmer Garage for repair work on this 1972 Buick. On March 25, 1978, Bryant purchased a 1977 Buick, and on April 1, 1978 he received a check for $126.20 for payment

of the insurance premiums on this second automobile. Plaintiffs challenge each of these strike fund expenditures.

After examining the evidence introduced at trial, including the testimony of Gary Daniels at the criminal trial (Plaintiffs' Exhibit No. 31), the Court finds these strike fund expenditures reasonable. First, the need for payment of these insurance premiums was unquestionably present. Gary Daniels, an employee with Farm Bureau Insurance Company, testified that had Bryant not timely paid his premiums when due (and they were due), the policies covering these automobiles would have been cancelled. Second, Bryant used both automobiles extensively for union purposes. He testified that everyday travel to and from Eufaula, combined with the long trips in support of the boycott, finally took its toll on the 1972 Buick. He was forced to

purchase the 1977 Buick, and he frequently used this automobile on boycott trips and other travel to and from Eufaula. The fact that both automobiles were used primarily for union business buttresses this Court's belief that the above strike fund expenditures were reasonable. Other strikers were given checks for payment of automobile insurance premiums to avoid cancellation of the policies, even where there is no indication that said automobiles were used occasionally for union business. For all of the aforementioned reasons, the Court finds these strike fund expenditures reasonable.[15]

On or about March 13, 1978, Billy Bryan received a check for $678.40 and used this check to pay in full the loan account on his

15. The same analysis and results applies to Bryan's receipt of a check for $136.00 on April 22, 1978, said check being issued for the payment of mechanical

breakdown insurance on the 1977 Buick.

The Court also finds reasonable Bryan's receipt of strike funds to pay in full the loan account for his 1972 Buick. The strike committee authorized his receipt of these funds, undoubtedly in recognition of the fact that Bryan's extensive, union-related travel finally took its toll on this automobile.
1972 Buick, which was three months past due at the time this payment was made. On March 25, 1978, Bryan purchased a used 1977 Buick for $5,550.00. He made a down payment of $2,000.00, and financed the remainder of the purchase price by borrowing $3,500.00 from the Farmer's Exchange Bank. His purchase of this 1977 Buick was prompted by the fact that he could no longer rely on his 1972 Buick to make the necessary trips to and from Eufaula each day or the trips to the various destinations were the union was promoting the boycott.

The greatest portion of the $2,000.00 down payment consisted of earnings of Mrs.

Bryan from her employment with the Barbour County Board of Education and a tax refund. See Defendants' Exhibit No. 12; Bryan's Deposition, p. 50. The remaining portion of the down payment consisted of four checks from the strike fund, totalling $810.00. See Plaintiffs' Exhibit No. 28. Following the initial purchase of the 1977 Buick, Bryan received four additional checks totalling $864.00, which he used as payments of his loan account with the Farmer's Exchange Bank. See Plaintiffs' Exhibit No. 25. The monthly payments were $119.00, and after these four checks were credited to Bryan's account, the account was paid through November 1978.

Plaintiffs argue that Bryan's 1972 Buick was kept in good repair with strike funds and that he could have continued to use this automobile in his union-related travels. Proceeding on this argument, plaintiffs

contend that Bryan's purchase of the 1977 Buick, and specifically his use of strike funds in connection with that purchase, was manifestly unreasonable. However, the only evidence before the Court concerning the condition of the 1972 Buick was Bryan's testimony that it was no longer capable of making the required trips for the union. Since Bryan unquestionably needed the use of an automobile in order to carry out his duties as a strike leader, the Court finds reasonable his purchase of the 1977 Buick and his use of strike funds for the initial purchase and subsequent monthly payments.[16]

On March 25, 1978, defendant Greene received a check for $180.00 and used this check to make two mortgage payments. According to the testimony of Anthony Plemons, an employee of the Farmer's Home Administration, Greene's mortgage debt was

current at this time, and this payment placed Greene one month ahead. See Defendants' Exhibit No. 1. Greene subsequently received four other checks form the strike fund for the purpose of mortgage payments, and his receipt of these checks constituted payment of his mortgage debt through October 1978. See Check No. 5985 ($180.00); Check No. 6696 ($300.00); Check No. 6738 ($180.00); and Check No. 6744 ($140.00).

Mr. Caldwell testified that he authorized defendants to use strike funds to make advance mortgage payments. At the time he gave this authorization, defendants were unemployed. He further testified that it would be unauthorized for defendants to use strike funds to make mortgage payments after the date they obtain full-time employment. Mr. Strevel offered similar testimony. Therefore, plaintiffs submit that the Court

should at least order reimbursement from Greene for the strike funds he received in June 1978 and used for mortgage payments in September and October 1978, since he returned to full-time employment in August 1978.

Greene maintained, however, that Mr. Caldwell never informed him that once he obtained full-time employment he would have to return any strike funds he previously to make advance mortgage payments. The other defendants offered similar testimony, and Mr. Caldwell did not testify otherwise. Under these circumstances, the court concludes that Greene need not reimburse the union for the September and October mortgage payments that he made with strike funds in June 1978.

On or about May 8, 1978, George Bullard received a check for $270.00 and used this check as partial payment for a mortgage debt

he owed to the Farmer's Home Administration. Anthony Plemons testified that this payment placed Bullard $411.00 ahead of schedule on his mortgage payments, which were $83.00 per month. At the time Bullard received this check, he was unemployed. Soon thereafter, he went to work for Cutler Egg Products. For the same reasons the Court found reasonable Greene's receipt of strike funds as advance mortgage payments, the Court finds Bullard's receipt of these funds reasonable and will not order his reimbursement of these funds. However, the Court does find unreasonable Bullard's receipt of check number 6743 ($180.00) on June 3, 1978. Although the purpose given for his receipt of this check was "house payment," Anthony Plemons testified that this check was never received and applied against Bullard's mortgage account. Furthermore, Bullard had begun full-time

employment with Cutler Egg Products in May 1978. Since Mr. Caldwell and Mr. Strevel both testified that it would be an unauthorized strike fund expenditure for a defendant to receive strike funds for mortgage payments when at the time of his receipt the defendant was employed full-time, the Court must conclude that Bullard should repay $180.00 to the union.

After examining these "third-party expenditures" to determine whether defendants' receipt was unreasonable, the Court concludes that each defendant should repay to the union the following amounts received by the as "third party expenditures."

DEFENDANT	AMOUNT
Charlie Greene	$1,680.32
Arthur Comer	0.00
George Bullard	400.00
Billy Bryan	225.00

The Court recognized that it has been liberal to the defendants in allowing many of these "third party expenditures," but many of them were expressly authorized by representatives of the International before defendants received the funds and others were characterized as proper by high ranking International representatives. The Court is aware the representatives of the International are in a far better position than this Court to judge what expenditures are in the long run interest of the union to

see that effective strike leadership is provided.

III. INDEMNITY LIABILITY

Plaintiffs' complaint against defendants Greene, Comer, Bullard, and Bryan was filed on May 1, 1980. On July 7, 1983, plaintiffs amended their complaint to add the bonding company, United States Fidelity & Guaranty Corporation (USD&G), as co-defendant. USF&G has raised several grounds in support of its position that it should be absolved from any financial liability in this action.

USF&G initially contends that there is no statutory authority to join it as a defendant in this action. This same argument has been advanced by bonding companies in other cases and has been rejected by the courts in each instance.

See Robinson v. Weir, 277 F. Supp. 581, 582 (D. Neb. 1966); Purcell v. Keane, 277 f. Supp. 252, 257 (ElDl Pa. 1967), affirmed, 406 F. 2d 1195 (3rd Cir. 1965). Consistent with the rationale in Robinson and Purcell, supra, this Court holds that a union member may join as a defendant in a Section 501 action the surety which has bonded the officer defendants and that Section 502 implicitly authorizes such joinder.

USF&G next contends that given it if is properly joined as a defendant in this action, plaintiffs failed to satisfy various preconditions to suit on the bonds, and, thus, should be denied recovery on said bonds. Section 5 of the bond provides the following:

> Upon knowledge or discovery of loss under this bond, the insured shall: (a) give notice thereof as soon as practicable to the underwriter and (b) file detailed proof of loss, duly sworn to, with the underwriter within four months after the discovery of loss. No

> action shall lie against the underwriters, unless as a condition precedent thereof, there shall have been full compliance with all the terms of this bond, nor until 90 days after the requested proofs of loss have been filed with the underwriter, nor at all unless commenced within one year from the date when the insured discovers the loss.

Since it affirmatively appears that plaintiffs failed to give notice of the loss, failed to file a detailed proof of loss, and failed to institute this action within one year after discovery of the loss, USF&G urges a judgment in its favor. Unquestionably, such a result would obtain under Alabama law. Brown v. State Farm Mutual Automobile Casualty Insurance Co., 506 F.2d 976, 978 (5th Cir. 1975); Pharr v. Continental Casualty Co., 429 So. 2d 1018, 1019 (Ala. 1983).

Plaintiffs claim, however, that they would not be charged with the duty to satisfy the aforementioned preconditions to suit For this proposition, plaintiffs rely upon Purcell v. Keane, 277 F. Supp. 252 (E.D. Pa. 1967). In Purcell, as in this case, plaintiffs never provided the surety with notice of the loss or with a detailed proof of loss. In rejecting the surety's argument that plaintiffs' failure to comply with these preconditions of the bond

discharged the surety from liability, the court held that where the "individual members had no actual knowledge of the provisions of the surety contract, they will not be charged with the duty of giving notice to the surety company in accordance with the provisions of the insurance policy." Id. at 258. Accord, Irving Trust Co. v. Nationwide Leisure Corp., 95 F.R.D. 51,67 (S.D.N.Y. 1982); Giordani v. Hoffman, 295 F. Supp. 463, 477 (E.D. Pa. 1969).

There is no evidence that plaintiffs acquired knowledge of the provisions of the bond before receiving a copy thereof from USF&G on September 15, 1983. However, it is undisputed that plaintiffs were put on notice at least by June 9, 1980 that USF&G had bonded the individual defendants. See Defendants' Exhibit No. 5. Despite this notice, plaintiffs apparently made no effort to secure a copy of the bond from the International or USF&G. In fact, USF&G had no indication that it might be involved in this action until it was added as a party defendant on July 7, 1983.

The provisions in USF&G's bond are certainly not unique to Section 502 surety

bonds. Similar provisions are found in every bond or surety contract. Given plaintiffs', or at least their counsel's, knowledge that USF&G had bonded the individual defendants, the Court finds a delay of more than three years in bringing USF&G into the lawsuit us unreasonable. While the Purcell rule is conceptually sound in the abstract where one is dealing with a suit brought by union members under Sec. 501(b), the Purcell court was not considering a factual situation where plaintiff's counsel waited for more than three years after being provided with evidence of a bond before taking any action to advise the surety of any claim. In the opinion of this Court, the rule should be that the bond's time limitations were tolled until plaintiffs first learned of the bond's existence and thereafter were given a reasonable time to inquire about its

coverage and conditions. Since plaintiffs learned in June 1980 that a bond covered these defendants but despite this knowledge did nothing until July 1983, the Court must conclude that a reasonable time expired and that USF&G should be discharged from all liability.

CONCLUSION

After examining the foregoing findings in light of the applicable legal principles, the Court concludes that the union is entitled to reimbursement of the following amounts from each defendant:

DEFENDANT	AMOUNT
Charlie Green	$6,102.73
Arthur Comer	3,206.41
George Bullard	3,084.08
Billy Bryan	2, 068.08

A separate judgment will be entered in accordance with this memorandum opinion.

DONE this 6th day of June, 1984.

UNITED STATES DISTRICT JUDGE

CA No. 80-180-N

APPENDIX A

A. Charlie Greene

CHECK NO.	DATE	AMOUNT	PURPOSE
1. 2031	6/4/77	$80.00	Union Business
2. 2126	6/11/77	80.00	Union Business
3. 2356	6/25/77	15.00	U.B/AL Power
4. 3374	9/3/77	50.00	Strike Benefit
5. 3501	9/10/77	50.00	Strike Benefit
6. 3642	9/24/77	150.00	Strike Benefit
7. 3738	10/1/77	300.00	S.B/Med. Exp.
8. 3767	10/8/77	90.00	Strike Benefit
9. 3889	10/15/77	100.00	Strike Benefit
10. 3971	10/22/77	120.00	Strike Benefit
11. 4066	10/29/77	150.00	Strike Benefit
12. 4148	11/5/77	240.00	Strike Benefit
13. 4194	11/12/77	150.00	Strike Benefit
14. 4257	11/16/77	50.00	Picket Ln. Exp
15. 4302	11/19/77	180.00	Strike Benefit
16. 4365	11/26/86	75.00	Strike Benefit
17. 4606	12/14/77	100.00	Strike Benefit
18. 4793	12/17/77	210.00	Strike Benefit
19. 4836	12/31/77	160.00	Strike Benefit
20. 4929	1/6/78	75.00	Strike Benefit
21. 5035	1/7/78	150.00	Strike Benefit

*Beginning in April 1978, the checks which previously had been issued with the accompanying purpose in the ledger as "strike benefits" were no longer denoted as such. There was no purpose stated for these checks. This failure to properly denote these checks as strike benefits was probably due in part to Walter Ward's abandonment of the strike around this time and time constraints placed on Charlie Green by his having to make several boycott trips for the union.

22. 5208	1/23/78	150.00	Strike Benefit
23. 5292	1/28/78	100.00	Book Work
24. 6087	4/1/78	75.00	Strike Benefit*
25. 6262	4/15/78	60.00	Strike Benefit
26. 6270	4/18/78	33.00	Strike Benefit
27. 6325	4/22/78	200.00	(No Purpose)
28. 6413	4/29/78	80.00	(No Purpose)
29. 6497	5/6/78	120.00	Strike Benefit
30. 6649	5/13/78	120.00	Paid Bill
31. 6721	5/27/78	170.00	Strike Benefit
32. 6759	6/10/78	75.00	Strike Benefit
33. 6812	9/11/78	244.10	Lost Time/Exp

CA No. 80-180-N

APPENDIX A

B. Arthur Comer

CHECK NO.	DATE	AMOUNT	PURPOSE
1. 2592	7/16/77	$125.00	Strike Benefit
2. 2798	7/23/77	77.00	Strike Benefit
3. 2799	7/23/77	25.00	Strike Benefit
4. 2851	7/30/77	55.00	Strike Benefit
5. 3350	9/3/77	228.00	5 weeks S.B.
6. 3639	9/24/77	180.00	Strike Benefit
7. 3796	10/15/77	220.00	Strike Benefit
8. 4009	10/29/77	320.00	Strike Benefit
9. 4932	1/7/78	330.00	Strike Benefit
10. 5358	2/4/78	187.00	Strike Benefit
11. 5395	2/11/78	210.00	Strike Benefit
12. 6012	3/25/78	220.00	Strike Benefit
13. 6047	4/1/78	275.00	No Purpose Std
14. 6509	5/6/78	330.00	Strike Benefit
15. 6756	6/10/78	165.00	Strike Benefit
16. 668	12/15/78	339.68	Strike & Trips

C. Billy Bryan

	CHECK NO.	DATE	AMOUNT	PURPOSE
1.	3730	10/1/77	50.00	Strike Benefit
2.	3811	10/8/77	49.00	Strike Benefit
3.	3885	10/15/77	130.00	Strike Benefit
4.	3973	10/22/77	50.00	Strike Benefit
5.	4064	10/29/77	269.00	Strike Benefit
6.	4065	10/29/77	50.00	Strike Benefit
7.	4145	11/5/77	52.00	Strike Benefit
8.	4232	11/12/77	150.00	Expenses
9.	4331	11/19/77	50.00	Strike Benefit
10.	4400	11/26/77	50.00	Strike Benefit
11.	4499	12/3/77	49.00	Strike Benefit
12.	4593	12/10/77	51.00	Strike Benefit
13.	4796	12/17/77	210.00	Strike Benefit
14.	4905	12/31/77	274.00	Strike Benefit
15.	4906	12/31/77	50.00	Strike Benefit
16.	5713	3/4/78	52.00	Strike Benefit
17.	5822	3/11/78	100.00	Strike Benefit
18.	5867	3/18/78	185.00	Car Repair
19.	5926	3/25/78	300.00	Strike Benefit
20.	5982	3/25/78	50.00	Strike Benefit
21.	6086	4/1/78	50.00	Strike Benefit
22.	6176	4/8/78	50.00	Strike Benefit
23.	6260	4/15/78	150.00	Strike Benefit
24.	6411	4/22/78	125.00	No Purpose Std
25.	6522	5/6/78	150.00	Strike Benefit
26.	6645	5/13/78	375.00	Expenses
27.	6722	5/27/78	125.00	Strike Benefit
28.	6762	6/10/78	175.00	Personal Bills
29.	6814	9/11/78	379.56	Lost Time/Exp

C. George Bullard

	CHECK NO.	DATE	AMOUNT	PURPOSE
1.	2016	6/4/77	60.00	Union Business Pd Member Bill*
2.	2127	6/11/77	288.81	Union Business Trip
3.	2253	6/18/77	83.36	Union Business Strike Benefit
4.	2261	6/18/77	210.00	Picket Expense Strike Benefit
5.	2352	6/25/77	92.12	Union Business Pd Member Bill
6.	2477	7/2/77	90.72	Union Business Pd Member Bill
7.	2549	7/9/77	149.19	Union Business Pd Member Bill
8.	2551	7/9/77	89.76	Union Business Pd Member Bill
9.	2671	7/16/77	60.00	Strike Benefit
10.	2678	7/16/77	66.26	Picket Line Exp
11.	2782	7/23/77	116.08	Picket Line Exp
12.	2880	7/30/77	105.66	Union Expense
13.	3725	10/1/77	85.94	Picket Line Exp Strike Benefit
14.	3726	10/1/77	45.00	Strike Benefit
15.	3755	10/8/77	85.00	Strike Benefit

George Bullard testified that whenever a check states "Union Business" or "Strike Benefit" as its purpose, chances are that check was intended to be for picket line and union hall expenses. He never was involved with maintaining the financial records, and the different people who were often categorized an expenditure differently.

16.	3868	10/8/77	88.52	Strike Benefit
17.	3870	10/15/77	184.99	Picket Line Exp
18.	4016	10/29/77	84.77	Picket Line Exp
19.	4017	10/29/77	105.00	Strike Benefit
20.	4147	11/5/77	130.15	Picket Line Exp
21.	4180	11/12/77	167.50	Strike Benefit
22.	4181	11/12/77	81.53	Picket Line Exp
23.	4333	11/19/77	55.00	Strike Benefit
24.	4338	11/19/77	50.00	Strike Benefit
25.	4416	11/26/77	95.05	Picket Line Exp
26.	4600	12/10/77	113.17	Picket Line Exp
27.	4817	12/17/77	50.49	Picket Line Exp
28.	4818	12/17/77	210.00	Strike Benefit
29.	4835	12/27/77	143.00	Strike Benefit
30.	5006	1/7/78	129.73	Picket Expense Strike Benefit
31.	5079	1/14/78	182.00	Strike Benefit
32.	5080	1/14/78	81.18	Picket Expense Strike Benefit
33.	5283	1/28/78	190.70	Picket Expense Strike Benefit
34.	5370	2/4/78	102.10	Picket Expense Strike Benefit
35.	5460	2/11/78	72.13	Picket Expense* Strike Benefit
36.	5554	2/18/78	82.69	Picket Expense* Strike Benefit
37.	5635	2/25/78	107.35	Picket Expense* Strike Benefit
37A.	5716	3/4/78	137.25	Utilities
38.	5817	3/11/78	216.23	Utiltiies House Payment
39.	5818	3/11/78	101.21	Picket Expense*
40.	5896	3/18/78	98.31	Picket Expense* Strike Benefit
41.	5983	3/22/78	117.15	Picket Expense* Strike Benefit
42.	6084	4/1/78	117.56	Picket Expense*
43.	6170	4/8/78	123.85	Picket Expense*
44.	6172	4/8/78	243.10	Utilities
45.	6259	4/15/78	132.86	Picket Expense*
46.	6323	4/22/78	100.37	Picket Expense*

47. 6326	4/22/78	67.50	Strike Benefit
48. 6407	4/29/78	142.00	Strike Benefit
49. 6408	4/29/78	93.30	Picket Expense*
50. 6489	5/1/78	129.34	No Purpose Stated
51. 6639	5/13/78	75.00	Strike Benefit
52. 6694	5/20/78	50.00	Strike Benefit
53. 6714	5/27/78	222.00	No Purpose Stated
54. 6715	5/27/78	247.00	No Purpose Stated

IN THE UNITED STATES DISTRICT COLUMBIA
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ELBET ERKINS and
SAMUEL DENSON

Plaintiffs

vs.

BILLY BRYAN, and ARTHUR
COMER, and GEORGE BULLARD,
and CHARLIE GREENE, and
UNITED STATES FIDELITY
AND GUARANTY CORPORATION

Defendants

JUDGMENT

In accordance with the attached memorandum opinion, it is

ORDERED, ADJUDGED and DECREED that United Steelworkers of America, AFL-CIO have and recover from the individual defendants the following amounts:

Charlie Greene	$6,102.73
Arthur Comer	3,206.41
George Bullard	3,084.08
Billy Bryan	2,068.08

It is further ORDERED, ADJUDGED AND DECREED that United Steelworkers of American, AFL-CIO-CLC have and recover nothing from defendant United States Fidelity and Guaranty Corporation.

This Court having determined that United States Fidelity and Guaranty Corporation was discharged from any and all liability under its bond, it is further ORDERED, ADJUDGED and DECREED that the cross claim of United States Fidelity and Guaranty Corporation against the individual defendants is dismissed as moot.

It is further ORDERED that the court costs incurred in this proceeding are hereby taxed against the individual defendants, for which execution may issue.

DONE this 6th day of June, 1984.

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

Of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER

BERNARD KLEIMAN
JAMES D. ENGLISH
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

® 60

TABLE OF CONTENTS

	Page
1. *The "Member" Issue*	2
2. *The Attorneys Fee Issue*	4

TABLE OF AUTHORITIES

Cases

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)	4-6
Hall v. Cole, 412 U.S. 1 (1973)	4-6
Laidlaw Corp., 171 NLRB 1366 (1968)	3
Taylor v. Great Lakes Seamen's Union, Local 5000, 701 F.2d 590 (6th Cir. 1983)	3-4

Statutes

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.*	
§ 3(o), 29 U.S.C. § 402(o)	4
§ 102, 29 U.S.C. § 412	5-6
§ 501(b), 29 U.S.C. § 501(b)	4-7

Legislative Materials

H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959)	6, 7
105 Cong. Rec. 15549 (1959)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-372

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

Of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER

The Brief in Opposition inaccurately describes the role of USWA in this matter, both prior to the institution of this lawsuit and during the litigation of the merits in the lower courts. As these matters are not central to the issues raised in our petition, we address them in the margin.[1] In text, we address certain of the arguments

---

[1] Respondents challenge USWA's statements that its limited intervention ended with the resolution of the "member" issue, and that USWA was not a party to the litigation on the merits (Br. Opp. 29-30). But that USWA's intervention was limited was recognized in the opinions of both courts below (App. 54a n.1, 42a). Indeed, after the "member" issue was resolved, USWA was not even

advanced by respondents that *do* bear on the issues presented.

1. *The "Member" Issue*

a. Respondents assert that they were still members of USWA, "within the Steelworker's constitutional definition of eligibility for membership," at the time this suit was filed (Br. Opp. 13). On that basis, they argue that the first and second questions are not properly presented (*Id.* 38).

Respondents' contention is, to say the least, revisionist, for respondents conceded the opposite in the district court. As that court explained, in the hearings before it "plaintiffs' counsel again and again acknowledged that plaintiffs were not members of the union at the time the complaint was filed" (App. 63a). Indeed, the court quoted the

---

served with subsequent pleadings by the parties, and the district court expressly ruled at the trial on the merits that USWA was "not a party to this case" (Tr. 375), could not "participate in any argument" (Tr. 374), or "put[] on any testimony," "cross-examin[e] witness or anything else" (Tr. 404). (These rulings were made on the one occasion that USWA counsel appeared at the trial—to accompany a USWA staff representative who was called by one of the parties as a witness).

Respondents seek to impugn the quality of USWA's initial response to their allegations of misappropriation (Br. Opp. 31-33). But USWA's response—to turn the matter over to the Department of Labor for investigation—was entirely sensible (Pet. 4, 21-22). Indeed, the court below did not dispute the accuracy of USWA's evaluation that "the way it handled the matter instead of filing suit . . . [was] more beneficial to the Union" (App. 49a).

Finally, respondents suggest that USWA was uncooperative to respondents in furnishing them access to union records and witnesses during discovery (Br. Opp. 33-34). Quite the contrary, USWA voluntarily granted extensive cooperation to counsel for both sides—on an even-handed basis—in their access to union records and personnel. The cooperation extended to respondents' counsel was documented in an Appendix to USWA's opening brief to the court below (where this assertion was first made by respondents).

passages of the hearing transcript in which plaintiffs' counsel acknowledged that "clearly they were not members at [that] time" (*Id.*) Based on these concessions and on the record evidence, the district court found *as fact* that plaintiffs did not meet the Steelworkers' definition of membership at the time they filed this suit (App. 57a, 59a, 64a-65a).

In an effort to resurrect their position on this factual issue, respondents assert that the very decision with which we contend the decision below conflicts stated that the Steelworkers' Constitution treats persons in respondents' status as members (Br. Opp. 39-40, citing *Taylor v. Great Lakes Seamen's Union, Local 5000*, 701 F.2d 590, 592 (6th Cir. 1983)). That is not correct. As *Taylor* explained, 701 F.2d at 591 n.1, under the Steelworkers' Constitution persons who are laid off remain eligible for membership. And as permanently replaced strikers enjoy a legal right to be placed on a recall list, *Laidlaw Corp.*, 171 NLRB 1366 (1968), they have layoff status and thus remain members of USWA. *But all this assumes that USWA continues to serve as the exclusive bargaining representative of the employees involved.* What respondents are overlooking is that here USWA was *decertified* as the bargaining representative. Respondents may have enjoyed recall rights to their plant, but their plant no longer was within USWA's jurisdiction.

It was the decertification of USWA, not the permanent replacement of respondents, that terminated respondents' status as USWA members. As respondents' counsel told the district court, respondents remained members of USWA after they had been permanently replaced "up to the time the union was decertified" (App. 63a). And the district court found that respondents' membership status "was extinguished on the decertification of the union" (*Id.* 64a). Nothing in *Taylor* suggests a different understanding of USWA's Constitution.

b. Respondents dispute that the decision below conflicts with *Taylor*, claiming that the Sixth Circuit in

Taylor deemed "crucial" the fact that in the case before it the plaintiffs' loss of employment was the result of voluntary resignation rather than permanent replacement (Br. Opp. 40, quoting *Taylor*, 701 F.2d at 592). Respondents have mischaracterized *Taylor*. The court began by dismissing plaintiffs' contention that their position was supported by certain decisions of the Seventh Circuit, noting that in those cases the plaintiffs' loss of employment had been involuntary, and observing: "This crucial factual distinction, in our opinion, deprives the Seventh Circuit's rather broad language of any controlling weight in the controversy before us" (701 F.2d at 592). But in order to resolve the case before it, the *Taylor* court found it necessary to decide whether § 3(o) of the LMRDA is "a guarantee of continued membership" absent expulsion or suspension, and concluded that it is not (*id.*). The construction of § 3(o) in the decision below conflicts squarely with that in *Taylor*.

2. *The Attorneys Fee Issue*

a. Respondents contend (Br. Opp. 46-48) that USWA's position on the attorneys fee issue—that Congress' creation of an express, limited fee entitlement in § 501(b) precludes larger fee awards under the common benefit theory—is inconsistent with this Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973). Respondents' reliance on *Hall* is misplaced.

In *Hall*, the Court held that a union member who successfully vindicated his rights under Title I of LMRDA was not precluded by the general remedial scheme of *that* Title from an award of attorneys' fees under the common benefit exception to the American Rule. 412 U.S. at 10-13. In distinguishing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), the Court in *Hall* reasoned that the remedial provision in Title I (§ 102, 29 U.S.C. § 412, which authorizes "such relief (including injunctions) as may be appropriate")

was not an express provision of remedies precluding the granting of other equitable remedies; rather, it constituted "a broad mandate" from which "we cannot fairly infer . . . an intent to deny to the courts the traditional equitable power. . . ." 412 U.S. at 10-11.

Unlike the remedial provision in Title 1, the remedial provision in Title V (§ 501(b)) constitutes not "a broad mandate" but a narrow authorization for certain forms of relief. The Court made this very point in *Hall*, by contrasting the remedial language of § 102 with the language of § 501(b), explaining that the latter "deal[s] with narrowly defined problems under the Act, and *specifically authorize*[s] . . . *limited remedies*. . . ." *Id.*, at 10 (emphasis added). The plain import of the Court's analysis is that remedial provisions such as § 501(b), which—like the provision reviewed in *Fleischmann* and *unlike* the provision at issue in *Hall*—"meticulously detail the remedies available to a plaintiff,"[2] reflect Congress' intent that only those detailed remedies are available. Thus, while the Court in *Hall* declined to apply the rationale of *Fleischmann* to Title I remedies, its language and reasoning support the applicability of *Fleischmann* in the Title V context.

The decision in *Hall* is of no help to plaintiffs for a second reason. The petitioners there argued that because Congress expressly authorized the recovery of attorneys' fees under certain Titles of the LMRDA, the failure to mention attorneys' fees in § 102—Title I's remedial provision—should be understood as denying to the courts the power to award fees in Title I actions. 412 U.S. at 10. The Court in *Hall* refused to draw such a negative inference from Congressional silence. But unlike § 102, which is silent on the subject of attorneys' fees, § 501(b) expressly provides for a precise form of attor-

---

[2] *Hall v. Cole*, 412 U.S. at 10 (quoting *Fleischmann*, 386 U.S. at 719).

neys' fee relief: "a reasonable part of the recovery." The *Hall* Court's unwillingness to draw a negative inference from Congressional silence surely does not constitute authorization for judicial fee awards that conflict with this plain statutory language.

The Court in *Hall* also relied on the legislative history of § 102, finding "no suggestion anywhere in th[at] history that even a single member of Congress . . . desired the words 'such relief . . . as may be appropriate' to restrict the historic equity powers of the federal courts." 412 U.S. at 12-13. In this regard, the legislative history of § 501(b) hardly could be more divergent. As we demonstrated in the Petition (at 16), Congress clearly manifested its intention to permit fee awards in § 501(b) cases only out of the monetary recovery.

b. In an effort to find support in the legislative history for a construction of § 501(b) at variance with its plain language, respondents point to the supplemental views of five House members, contained in the House Education and Labor Committee Report on the Elliott bill, H.R. 8342. (Br. Opp. 44-46). The five members, including Congressman Elliott, stated that under the attorneys' fee language of that bill—which was identical to the language ultimately enacted as part of § 501(b)—a union member "may recover counsel fees and costs if he prevails." H.R. Rep. No. 741, 86th Cong., 1st Sess. 82 (1959). In respondents' view, this statement was "extremely important" because its authors, "key supporters of the 'realist' labor position, . . . likely carried to the floor and the conference this understanding of § 501." (Br. Opp. 45-46).

Respondents' reliance is misplaced. The supplemental views do not indicate support for a fee-shifting principle different from that stated in § 501(b). At most, the statement that a prevailing member "may recover counsel fees" is ambiguous with regard to the source and amount of the fees. And the ambiguity respecting the intentions

of the signers of the supplemental views disappears when the entirety of the legislative materials are examined. In its Section by Section Analysis of H.R. 8342 as reported, the House Committee majority (which included the five so-called "labor realists") stated that the fee provision allowed the court to "allot a reasonable part *out of any recovery*" to pay the prevailing members' attorneys' fees. H.R. Rep. No. 741, *supra*, at 45 (emphasis added). Moreover, Congressman Elliott himself explained his understanding of the attorneys' fee provision on the House floor: "the bill provides for allocation of an *appropriate part of the recovery* for counsel fees and expenses." 105 Cong. Rec. 15549 (1959) (emphasis added). In short, the House understanding of the attorney's fees language was identical to that expressed in the Senate, where the language originated: fees are to be awarded to prevailing members' counsel out of whatever monetary amount has been recovered for the union. Nothing in the floor debates or the conference report is to the contrary.

Respectfully submitted,

BERNARD KLEIMAN
JAMES D. ENGLISH
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340
Attorneys for Petitioners